(30,411)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 446

L. LITTLEJOHN & CO., INC.; GENERAL SILK IMPORTING COMPANY, HENRY W. PEABODY & CO., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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[fol. 1] **IN UNITED STATES DISTRICT COURT**

DOCKET ENTRIES

Date	
Feb. 19, 1921.	Filed libel and stipulation for costs.
Mar. 10, 1921.	Filed affidavits of service.
Aug. 16, 1922.	Order entered sub. B. E. J.
Sept. 7, 1922.	Filed suggestion.
Sept. 26,	Filed order amending libels.
Sept. 29,	Filed order consolidating the following cases with this case for trial: 77/58-170 to 178 inc.-180-193-195-196-197-203-228-110 to 115 inc.-125 to 129 inc. 131-165 to 169 inc. 59-60-61-70-71-93 to 100 inc. 108-109-229 to 233 incl.-278-280-281-284-285-286-289-238-239-240-329.
29,	Filed order permitting filing of suggestion.
29,	Filed exceptions and answer to traverse.
29,	Filed affidavit of Bernard M. Baruch.
29,	Filed affidavit of Frank H. Phipps, Jr. and exhibits.
29,	Filed memorandum Hough, J. on order.
29,	Filed order setting issue for trial.
Oct. 4,	Filed motion for a monition for commencing prize proceedings and claim of L. Littlejohn & Co. Inc.
4,	Filed motion to traverse consolidated cause as a prize case.
4,	Filed notice of, and, motion for deposit on court of appraised value of S. S. "Antigone."
4,	Filed affidavit of C. J. Stimming.
11,	A. N. Hand, J., Case tried. Lib. Ex. 1. U. S. Ex. 9. Witness 2. Libellants Witness 1. Argued and submitted.
Jan. 23, 1923.	Filed opinion (A. N. Hand, J., 2331) libels dismissed.
Mar. 1,	Filed order dismissing libels.
1,	Filed certificate and notice.
Mar. 26,	Filed petition for appeal.
26,	Filed assignment of errors.
May 28,	Filed appeal bond.
28,	Filed citation.
June 22,	Filed order extending time to file record on appeal to July 25, 1923.

[fol. 2] 77-329

(Kirlin, Woolsey)

PRINCE LINE, LIMITED,

vs.

U. S. A.

Mar. 8, 1921. Filed libel, and stipulation for costs, and affidavits of service.
Sept. 5, 1922. Filed suggestion.
5, Filed notice of hearing.
12, Filed note of issue.
29, Consolidated with 77-57 for trial.
29, Filed in 77-57 affidavit of F. H. Phipp, Jr.

77-238

(Carter, Ledyard & Milburn)

FRANCES R. HENDERSON, HAROLD H. HENDERSON, and BANCROFT W. HENDERSON, as F. R. Henderson & Co.,

vs.

U. S. A.

Mar. 5, 1921. Filed libel and stipulation for costs.
8, Filed affidavit of service.
Sept. 7, 1922. Filed suggestion.
29, Consolidated with 77-57 for trial.
77-239, same.
77-240, "

[fol. 3] 77-57, etc.

Clerk's Number

Oct. 11, 1922.

Testimony for the U. S.
Tony v. Lynch called.
Order of seizure, Oct. 3, 1922, put on Ex. #1.
Copy Order June 30, 1917 (Executive), Ex. #2.
Copy Order Aug. 29, 1917, (Executive), Ex. #3.
Copy of despatch, from Force, U. S. N., Ex. #4.
Affidavit of Phipps, Sept. 26/22, Ex. #5.
Copy Order of Prest. May 12/17 put in Ex. #6.
Copy report of appraisers of vessel, put in Ex. #7.
Copy certificate of registry May 3, 1921, put in Ex. #8.
Copy certificate Sec'y of State Oct. 5/22, Put in Ex. #9.
Benj. E. Pendar called.
Testimony for libellant.

Affidavit of B. M. Baruch put in Ex. "A".
Adjourned to the 17th.
Resumed Oct. 23 '22.
Testimony for libellant continued.
John F. Dulles called.
Cases argued and submitted.
Briefs in a week.

[fol. 4] IN UNITED STATES DISTRICT COURT

LIBEL AND COMPLAINT OF L. LITTLEJOHN & CO., INC.—Filed February 19, 1921

First. At and during all the times hereinafter mentioned the libellant was and is now a corporation, created, organized and existing under and by virtue of the laws of the State of New York and was and is now engaged in the business of importing and dealing in rubber, gutta percha and other Far Eastern products, with its office and principal place of business at 133 Front Street, in the Borough of Manhattan, City, County and State of New York

[fol. 5] Second. The respondent United States of America does now and at all the times mentioned herein did own, operate or control the steamship "Antigone", her engines, boilers, etc. At the present time the said steamship "Antigone" is employed as a merchant vessel and is now in the Port of New York.

Third. At and during all the times hereinafter mentioned the libellant was the owner of about 6,941 cases of rubber, 645 cases of gutta percha, 924 cases of gambier, 1,534 cases of julatong, 247 bags of cube gambier, 611 bales of cube gambier and 788 bags sago flour laden on board the steamship "Gaelic Prince." The said rubber, gutta percha, gambier, cube gambier, julatong and sago flour were in good order and condition up to the time of the collision hereinafter described.

Fourth. On the 9th day of October, 1919, about 8 p. m. the said steamship "Gaelic Prince" inbound from Far Eastern ports, with libellant's said cargo on board entered Ambrose Channel in charge of a Sandy Hook pilot. The weather was fair and clear. The night was dark. The tide was the beginning of the ebb.

The "Gaelic Prince" proceeded up the channel keeping to the [fol. 6] side which lay to her starboard. When she reached a position in the Channel in the vicinity of Buoy No. 8, the red light and masthead lights of an outbound steamer, which subsequently proved to be the steamship "Antigone", were observed on the starboard bow of the steamship "Gaelic Prince." Shortly thereafter when the steamship "Antigone" was to the northward of Buoy No. 10 she sounded one blast of her whistle. The steamship "Gaelic Prince" replied with one blast and the pilot ordered the helm ported slightly. The vessel

swung a little to starboard and then on the pilot's orders was steadied on a course parallel with the Buoys. The steamship "Antigone" rounded the bend of Buoy No. 10 and showed both lights. The steamship "Gaelic Prince" again blew one blast. The steamship "Antigone", however, instead of keeping to the side of the Channel which lay to her starboard, shut in her red light and showed her green only. The steamship 'Gaelic Prince" was placed in a precarious position by this manœuvre and she blew a signal of two blasts and starboarded her helm. In the meantime the engines of the steamship "Gaelic Prince" had been slowed but when the vessels were green to green, to pass starboard to starboard, and her helm was starboarded, her engines were again put at full speed ahead. The steamship "Antigone" in this situation blew one blast and swung sharply to starboard as if she were under a port helm and collided violently with the steamship "Gaelic Prince" striking her just for-
[fol. 7] ward of the port bridge, cutting deeply into the steamship "Gaelic Prince". Water immediately began rushing into the holds of the steamship "Gaelic Prince", which resulted in serious loss and damage to the libellant's cargo. The collision occurred about 9:35 p. m. steamship "Gaelic Prince" ship's apparent time. Subsequently the steamship "Gaelic Prince" was beached in a sinking condition.

Fifth. The aforesaid collision and consequent damage to your libellant's aforesaid merchandise, were not caused or contributed to by any fault, neglect or want of care on the part of the libellant, but were due to the fault, neglect and want of care on the part of the steamship "Antigone" and those in charge of her, in the following among other particulars which will be pointed out on the trial of this action:

1. In that those in charge of the steamship "Antigone" were incompetent and inattentive to their duties.

2. In that those in charge of the steamship "Antigone" failed to maintain a sufficient and proper lookout.

3. In that those in charge of the steamship "Antigone" failed to keep their vessel to the side of the channel which lay to their starboard, as is required by the rules.

4. In that those in charge of the steamship "Antigone" having exchanged signals with the steamship "Gaelic Prince" to pass port to port, failed to keep to the southerly side of the channel, after rounding Buoy No. 10.

[fol. 8] 5. In that those in charge of the steamship "Antigone" having crossed the bow of the steamship "Gaelic Prince' and having gotten into a position to pass starboard to starboard, failed to heed the two-blast signal of the steamship "Gaelic Prince."

6. In that after the vessels were headed to pass starboard to starboard, the steamship "Antigone" ported her helm and came into collision with the steamship "Gaelic Prince".

7. In that those in charge of the steamship "Antigone" disregarded the signals of the steamship "Gaelic Prince" and swung to starboard.

8. In that those in charge of the steamship "Antigone" failed to keep their ship under proper control and to stop the ship in time to avoid the collision with the steamship "Gaelic Prince".

9. In that those in charge of the steamship "Antigone" did nothing to avoid the accident.

Sixth. By reason of the premises the libellant has sustained damage amounting to about the sum of One Hundred Ninety Thousand ($190,000.00) Dollars, as nearly as can now be estimated, no part of which has been paid although duly demanded.

[fol. 9] Seventh. All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that upon service of a copy of this libel on the United States Attorney for this district and mailing a copy thereof to the Attorney General of the United States, and the filing of a sworn return of said service and mailing in accordance with law, the respondent be required to appear and answer all and singular the matters aforesaid according to the principles of law and rules of practice obtaining in like cases between private parties and that this Honorable Court be pleased to decree to your libellant its damages with interest and costs and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

Harrington, Bigham & Englar, Proctors for Libellant.

Office & Post Office Address: No. 64 Wall Street, Borough of Manhattan, New York City.

[fol. 10] Jurat showing the foregoing was duly sworn to by R. M. Littlejohn omitted in printing.

[fol. 11] [File endorsement omitted.]

[fol. 12] IN UNITED STATES DISTRICT COURT

To the Honorable the Judges of the United States District Court for the Southern District of New York, Sitting as a Court of Prize:

No. —. In Prize

L. LITTLEJOHN & CO., INC., and GENERAL SILK IMPORTING COMPANY, Henry W. Peabody & Co., Isadore Goldberg, G. S. Plummer Co., U. S. Steel Products Co., Inc., The Goodyear Tire & Rubber Co., Meyer & Brown, Grace American International Corporation, John Zimmerman & Co., Hadden & Co., O. J. Weeks Co., Inc., E. L. Kirk & Valk Co., Louis Lazarus & Son, Olivier & Co., Old & Wallace, Inc., Fred Stern & Co., H. P. Winter & Co., Innes & Company, Land & Cox, Inc., Mendleson & Co., Hood Rubber [fol. 13] Company, Frederick H. Cone & Company, Inc., Poel & Kelly, Arthur E. Dowler, Doherr Grimm & Co., Paterson Boardman & Knapp, W. G. Ryckman & Co., Ward E. Pearson, William H. Stiles & Co., Rogers-Pyatt Shellac Co., T. A. Desmond & Co., Marshall Field & Co., Rosenberg & Alder, Thomett & Fehr, American Trading Company, Winter, Ross & Company, Rubber Importers & Dealers Company, J. L. Hopkins & Company, Inc., Federal Export Corporation, Mishel Leather Company, Jardine Matheson & Co., Ltd., Seton Leather Company, Ridgeway's Inc., Pell & Dumont, Charles V. Sparhawk, Inc., L. Vogelstein & Co., Inc., M. J. Brandenstein & Co., General Lumber Company, Winslow & Company, Inc., Commonwealth Mfg. Co., Lehmaier, [fol. 14] Schwartz & Co., Inc., Balfour, Williamson & Co., National Lead Company, Fitz-Dana & Co., Gaston, Williams & Wigmore, Inc., N. S. Corwin, New York Overseas Co., Inc., National Import & Export Co., Nathan Trotter Co., Mitsui & Co., Ltd., Charles F. Smillie Co., Francis R. Henderson, Harold H. Henderson & Bancroft W. Henderson, Trading as F. R. Henderson & Co.; J. C. Whitney Co., Charles T. Wilson Co., Inc., Prince Line, Limited, Claimants and Libellants,

against

STEAMSHIP "ANTIGONE;" THE UNITED STATES OF AMERICA, THE United States Attorneys for the Southern District of New York, and the Secretary of the Navy of the United States, Respondents.

MOTION FOR ORDER TO SHOW CAUSE

[fol. 15] In accordance with the provisions of Section 4625 of the Revised Statutes of the United States, the Claimants and Libellants above named as Claimants of a jus in re in the steamship Antigone, hereby respectfully move for a monition to show cause why proceedings in prize in the above entitled court shall not be commenced.

The said Claimants and Libellants further respectfully move that an order be entered directing that said monition when issued be

served on the United States Attorney for the Southern District of New York, and on the Secretary of the Navy of the United States, as well as on such other persons as the court may order to be notified.

The grounds of said motions are those stated in the claim filed herein and attached hereto.

Dated October 4th, 1922.

Bigham, Englar & Jones, Kirlin, Woolsey, Campbell Hickox & Keating, Carter, Ledyard & Milburn, Proctors for Libellants, 64 Wall Street, New York City.

[fol. 16] IN UNITED STATES DISTRICT COURT

CLAIM OF L. LITTLEJOHN & CO. INC., AS OWNERS OF A JUS IN RE IN THE STEAMSHIP ANTIGONE

L. Littlejohn & Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, on its own behalf and on behalf of all the other libellants in the above entitled cause, owners and claimants of a jus in re of the steamship Antigone, appear before this Honorable Court, and claim the said steamship Antigone and state that they are the true and bona fide owners of a jus in re therein, arising from a collision on October 9, 1919, in New York Harbor between the said steamship Antigone and the steamship Gaelic Prince, through the fault of said steamship Antigone, resulting in damage to cargo owned by your claimants on board said steamship Gaelic Prince; and that no other person, whether owner of a jus in re in said vessel or otherwise, is entitled to or is the owner of said steamship Antigone except subject to a jus in re of the libellants herein.

The said claimants further state that the said steamship Antigone, a privately owned enemy vessel, was captured or seized more than two years ago by certain persons purporting to represent the United States of America; that no proceedings against said steamship Antigone for her adjudication as a prize or otherwise have been taken by any one since said capture or seizure; that more than a reasonable time [fol. 17] has elapsed within which to commence said proceedings; that the United States of America is now in possession of said steamship Antigone; and that at all the times mentioned herein a private merchant or person was the sole owner of the said steamship Antigone, and was the only person entitled, prior to the 13th day of October, 1919, to the immediate or lawful possession or control thereof.

And thereupon, the said claimants and libellants pray that this Honorable Court will be pleased to decree the delivery of the said steamship Antigone or her appraised value to them, or that the United States of America be required to show cause why proceedings in prize against said steamship Antigone shall not be commenced forthwith, and otherwise right and justice to administer in the premises.

L. Littlejohn & Co., Inc.

[fols. 18 & 19] Jurat showing the foregoing was duly sworn to by R. M. Littlejohn omitted in printing.

[fol. 20] IN UNITED STATES DISTRICT COURT

LIBEL OF PRINCE LINE LIMITED

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel of Prince Line Limited, as owner of the Steamship Gaelic Prince, and as lawful bailee of her cargo, against United States of America, as owner of the steamship Antigone, her engines, tackle, apparel, and furniture, etc., and against all persons intervening for their interest therein, in a cause of collision, civil and maritime, alleges on information and belief as follows:

First. At all the times hereinafter mentioned, the libelant, Prince Line, Limited, was, and it still is, a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland; and it was, and is, the owner of the steamship Gaelic Prince, and the lawful bailee of the cargo on board; and it is authorized to prosecute this action.

Second. At all the times hereinafter mentioned, the steamship Antigone was, and it still is, owned and operated by the respondent, [fol. 21] United States of America, (United States Shipping Board). The said steamship Antigone is now employed as a merchant vessel, and is within the port of New York and within the jurisdiction of this Honorable Court.

The libelant elects to proceed in the present suit in accordance with the principles of a libel in rem, but not to be precluded from seeking relief in personam, as is provided by Section 3 of the Act of March 9, 1920.

Third. The Gaelic Prince is a single screw, steel cargo carrying steamship, of 6,506 gross tonnage and 3,952 net tonnage; 449.5 feet in length, and 57.3 feet beam. Until the collision hereinafter mentioned, the steamship Gaelic Prince was tight, staunch, and strong, and in all respects seaworthy; and well and fully officered, manned, equipped, and supplied.

On the night of October 9, 1919, the Gaelic Prince arrived at the entrance of New York Harbor, on a voyage from the Far East, with a full cargo of general merchandise. The weather was clear, but dark, and the tide was nearly at high water flood. A duly licensed Sandy Hook pilot, whose employment on board was compulsory, boarded the Gaelic Prince, and she entered Ambrose Channel shortly after 8 o'clock. The master was on the navigating bridge, with the [fol. 22] pilot, and the third officer; a competent seaman was stationed at the wheel; and a seaman was also stationed on lookout

watch on the extreme forward part of the forecastle deck. The regulation mast head and side lights were set and burning brightly.

The Gaelic Prince proceeded on a course up Ambrose Channel on her own starboard side of the center of the channel. While so proceeding, and while still in the outer stretch of the channel, the masthead and range lights (two bright lights) and the red side light of a vessel were sighted on the starboard bow of the Gaelic Prince. This vessel, which subsequently proved to be the Antigone, was then in the upper and northerly stretch, above the bend in Ambrose Channel. There were not any other vessels navigating in the immediate vicinity.

As the vessels approached each other, and while still in different sections of the channel, the Antigone sounded a signal of one blast, which was answered with one blast from the Gaelic Prince. The Gaelic Prince then ported her helm slightly, reduced her speed, and steadied on the channel course. The Antigone in continuing down [fol. 23] the channel crossed the bow of the Gaelic Prince from the latter's starboard to her port side, and it was later seen that she was turning to her port side to round the bend at Buoy "10," and to enter the outer stretch of the channel. The Antigone then opened her green light in addition to the red light, whereupon the Gaelic Prince sounded a second signal of one blast and directed her own course slightly more to the starboard side of the channel. The Antigone did not answer this second signal of one blast but swung rapidly to her own port side as if under a hard starboard helm, and at considerable speed; her red light became obscured and she was carried across the bow of the Gaelic Prince from the latter's port to her starboard side. This movement of the Antigone placed her on the northerly side of the center of the channel, in the outer stretch, with the vessels displaying only their green side lights to each other, and in relative positions to pass each other starboard to starboard. As it was then seen to be impossible to pass the Antigone safely port to port, and as the vessels were not far apart, the Gaelic Prince sounded [fol. 24] a signal of two blasts, starboarded the helm, and went ahead on her engines. The Antigone replied to the two blast signal by a cross signal of one blast, ported her helm, and swung rapidly to her starboard and towards the Gaelic Prince. The latter sounded an alarm signal, and stopped her engines but the collision occurred immediately, the stem of the Antigone striking the starboard side of the Gaelic Prince abreast of her No. 2 hatch with great violence, and penetrating several feet into the deck, and into the cargo compartments of No. 2 hold. The Gaelic Prince started filling, and it was seen at once that there was danger of sinking; her engines were started ahead, and she swung across the channel to the southern side and was beached in the shallow waters of Romer Shoal, in the vicinity of Buoy "9."

The collision occurred at about 8:35 p. m. by the time on the Gaelic Prince, in Ambrose Channel, southeasterly of Buoy "10," and to the northward of the center line of the channel.

The Antigone continued down the channel and then returned, but passed the Gaelic Prince without stopping or hailing her, or other-

wise offering or rendering her any assistance, although it must have been known that the latter was in distress.

[fol. 25] It became necessary to discharge and lighter part of the cargo of the Gaelic Prince and to undertake wrecking operations; and, on October 12th, the Gaelic Prince, having been again floated, she was conveyed to an anchorage off Tomkinsville and subsequently placed at her dock; the cargo was discharged, and the sound and damaged cargo separated. The Gaelic Prince later went into dry-dock and underwent very extensive repairs necessitated by reason of the collision.

Fourth. The said collision and the damages resulting therefrom were not caused or contributed to by any fault or negligence on the part of the steamship Gaelic Prince, her owner, the libelant herein, her master, pilot, officers, or members of her crew, or of those in charge of her navigation, or of anyone for whom the libelant may have been responsible, but they were caused by the steamship Antigone, and the negligence of her pilot, master, officers and members of her crew, and by those in charge of her navigation, in the following respects, among others that will be shown at the trial:

1. She was not in command or in charge of competent and careful persons.

2. She did not keep a proper and vigilant lookout.

[fol. 26] 3. She violated the provisions of Article 25 of the Inland Rules, Act of June 7, 1897, in that she did not keep to her own starboard side of midchannel.

4. She proceeded at excessive speed in making the turn at Buoy "10" in Ambrose Channel, and by improper use of her engines and helm, unnecessarily swung too far to her port side and across the channel.

5. She did not navigate in accordance with the agreement to pass port to port, but crossed from the port side of the Gaelic Prince to the latter's starboard side, and into the wrong side of the channel, thus making it impossible to carry out the agreed manoeuvre, and directly resulting in the collision.

6. She disregarded and did not answer the second signal blast of the Gaelic Prince.

7. She disregarded the two blast signal of the Gaelic Prince, but answered it by a cross signal of one blast, and swung to her starboard side, into the Gaelic Prince, when it was known or should [fol. 27] have been known that this manoeuvre would inevitably result in collision.

8. She did not slacken her speed or stop or reverse her engines to avoid collision.

9. She did not do anything to avoid the collision.

10. She did not stand by the Gaelic Prince after the collision, thus grossly violating the provisions of the Act of September 4, 1890, c 875, par. 1, 26 Stat. 425 (U. S. Comp. St. 1901, p. 2902).

Fifth: By reason of the promises and as a result of the said collision, the libelant herein has sustained heavy damages consisting of the expense of repairs to the steamship Gaelic Prince, wrecking and towage services, dockage, wharfage, survey, superintendence, and agency fees, loss of use of the vessel during the period of detention necessitated by the collision and repairs, general average, and other incidental and substantial expenses, which amount to about Four Hundred and Twenty-five Thousand Dollars ($425,000).

[fol. 28] A large amount of damage has also been sustained by the cargo that was on board the Gaelic Prince at the time of the collision, particularly the cargo in No. 2; also, there will be heavy general average and special charges on the cargo by reason of the collision and the direct consequences thereof. The extent of the total cargo damage cannot be stated definitely, at present, but it is estimated that this damage will approximate Eight Hundred Thousand Dollars ($800,000).

It has not been practicable thus far to separate and allocate the general average expenses accurately, and to state exactly the total damage to ship and cargo, respectively, inclusive of general average and special charges, but the total damage as now estimated amounts to One Million Two Hundred and Twenty-Five Thousand Dollars ($1,225,000) as aforesaid; and, the libelant begs leave to amend the libel in respect of the allocation of the damages, and to increase or decrease the amounts respectively, if, and as may be found necessary later.

Sixth: All and singular the premises of this libel are true and within the admiralty and maritime jurisdiction of the United States [fol. 29] and of this Honorable Court.

Wherefore, libelant prays that process in due of law may issue, citing the respondent to appear and answer in the premises, and that a decree may be entered herein in favor of the libelant against the respondent for the total amount of the damages, aforesaid, with interest and costs, or that the Court will grant to the libelant such other or further relief as the justice of the cause may require.

Kirlin, Woolsey, Campell, Hickox & Keating, Proctors for Libelant and S. S. Gaelic Prince.

Office and Post Office Address, 27 William Street, New York City.

[fol. 30] Jurat showing the foregoing was duly sworn to by H. C. Blackiston omitted in printing.

[fol. 31] IN UNITED STATES DISTRICT COURT

LIBEL OF F. R. HENDERSON & CO.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel and complaint of Francis R. Henderson, Harold H. Henderson and Bancroft W. Henderson, doing business under the firm name and style of F. R. Henderson & Company, against the United States of America, in a cause of collision and cargo damage civil and maritime, respectfully alleges as follows:

First: Your libelants Francis R. Henderson, Harold H. Henderson and Bancroft W. Henderson, are doing business under the firm name and style of F. R. Henderson & Company, and their principal place of business is in the Borough of Manhattan, City of New York, and within the Southern District of New York.

Second. Upon information and belief the respondent, United States of America at all times hereinafter mentioned owned and operated the steamship "Antigone" her engines, boilers, tackle, etc., and the said steamship "Antigone" her engines, boilers, tackle, etc. is now owned by the said respondent, United States of America, and is now employed as a merchant vessel and is now in the port of New York and within the jurisdiction of this Honorable Court.

Third: Upon information and belief on or about the 23rd day of August, 1919, the said steamship "Gaelic Prince" sailed from the Port of Kobe, Japan, bound on a voyage to the Port of New York, [fol. 32] laden with a shipment consisting of 3,857 cases of rubber marked "H. B. L.," which was at the time of the collision hereinafter set forth, the property of your libelants.

Fourth. Upon information and belief on the evening of the 9th day of October 1919, said steamship "Gaelic Prince" laden with your libelants' cargo as aforesaid came into collision with the steamship "Antigone" in Ambrose Channel in lower New York Harbor by reason of which, a large proportion of your libelants' said cargo of rubber became practically a total loss.

Fifth. Upon information and belief the libelants allege that the following are the circumstances of the collision; the weather was fair and clear and the night was dark. The "Gaelic Prince" with a Sandy Hook Pilot in charge of her navigation, was proceeding up Ambrose Channel keeping to that side of mid-channel which lay on her starboard side when those in charge of her navigation saw on the starboard bow, the red light and mast head lights of the "Antigone" coming down the channel. Shortly thereafter the "Antigone" blew a blast of one whistle before she reached the turn in the channel at buoy No. 10. The "Gaelic Prince" immediately replied with one blast of her whistle and her helm was ported slightly so as to direct her course a little further on the starboard

side of the channel and the vessel was steadied on a course parallel with the line of the Channel. As the "Antigone" came around the bend in the Channel at said buoy No. 10, her red and green lights were observed slightly on the port bow of the "Gaelic Prince". The "Gaelic Prince" again blew one blast and reduced her speed. The "Antigone" however, instead of keeping to that side of [fol. 33] the mid-channel which lay to her starboard, shut in her red light and showed her green light, and was observed crossing the course of the "Gaelic Prince" coming on her starboard bow. The vessels were then in such positions that each showed to the other the green light, and it was then apparent that the vessels could not pass port to port without colliding. The "Gaelic Prince" accordingly blew a signal of two blasts and put her helm hard astarboard to direct her course to port and her engines were again put full speed ahead. The "Antigone" in this situation then blew a signal of one blast and swung sharply to starboard and struck the "Gaelic Prince" on the starboard side just forward of the bridge, the stem of the "Antigone" cutting deeply into the "Gaelic Prince". Water immediately flooded the holds of the "Gaelic Prince" damaging your libelants' cargo, and the "Gaelic Prince" was immediately beached in a sinking condition.

Sixth. The collision and the damage resulting therefrom to your libelants' cargo were caused or contributed to by the fault of the steamship "Antigone" in the following particulars:

1. In that the steamship "Antigone" failed to maintain a proper lookout.

2. In that those in charge of the navigation of the steamship "Antigone" were incompetent and inattentive to their duties.

3. In that the steamship "Antigone" failed to keep to that side of the fairway or mid-channel which lay on her starboard side as provided by Article 25 of both the Inland Rules and the International Rules.

4. In that the steamship "Antigone" and those in charge of her navigation having exchange signals with the "Gaelic Prince" to pass port to port failed to keep to the southerly side of the Channel after rounding the bend at buoy No. 10.

5. In that those in charge of the navigation of the steamship [fol. 34] "Antigone" were negligent in allowing the vessel to swing too far in making the turn in the Channel causing her to swing across the bow of the "Gaelic Prince" so as to place the vessel in the position of green to green.

6. In that the "Antigone" and those in charge of her navigation after crossing the bow of the "Gaelic Prince" and getting into a position to pass starboard to starboard, failed to heed the two blast signal of the "Gaelic Prince."

7. In that after the vessels were headed to pass starboard to starboard, the "Antigone" ported her helm and came into collision with the "Gaelic Prince."

8. In that those in charge of the navigation of the "Antigone" failed to keep the vessel in proper control and to reserve and stop in time to avoid the collision.

9. In that the steamship "Antigone" and those in charge of her navigation were negligent in other particulars which your libelants will show upon the trial of this action.

Seventh. By reason of said collision your libelants have suffered damage in that a large proportion to wit: 1520 cases of said shipment of 3857 cases of rubber were badly damaged. The exact amount of the damage which your libelants sustained by reason of said collision has not yet been actually ascertained, but as your libelants are informed and believe said damages will amount to about the sum of $35,000.

Eighth. That all and singular the premises are true and within the admiralty jurisdiction of this Honorable Court.

Wherefore libelants pray that upon service of a copy of this libel upon the United States Attorney for this District and mailing a copy thereof to the Attorney General of the United States and the filing of a sworn return of such service and mailing in accordance with law, the respondent be required to appear and answer all the matters [fol. 35] aforesaid according to the principles of law and rules of practice obtaining in like cases between private parties, and that this Honorable Court be pleased to decree to your libelants their damages with interest and costs and that your libelants may have such other and further relief as in law and justice they may be entitled to receive.

Carter, Ledyard & Milburn, Proctors for Libelants.

Office & P. O. Address, 54 Wall Street, Borough of Manhattan, New York City.

[fol. 36] Jurat showing the foregoing was duly sworn to by Harold H. Henderson omitted in printing.

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUBSTITUTING PROCTORS FOR LIBELLANT—August 16, 1922

On the underwritten consent of Harrington, Bigham & Englar and on motion of Bigham, Englar & Jones,

It is hereby ordered that Bigham, Englar & Jones be substituted for Harrington, Bigham & Englar, as proctors for the Libellant.

Julius M. Mayer, U. S. D. J.

We hereby consent to the entry of the foregoing order.
Dated New York, July 18, 1922.
Harrington, Bigham & Englar, Proctors for Libellant.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF SERVICE OF LIBEL

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

Paul C. Swartwood, being duly sworn, deposes and says: That he is over the age of 20 years; that he is a clerk in the employ of Harrington, Bigham and Englar, proctors for the libellant herein.

That on the 2 day of March, 1921, at 6.45 o'clock P. M., he served a true copy of the libel in the above action upon Hon. A. Mitchell Palmer, Attorney General, by depositing a true copy thereof in the United States Mail at the Wall Street Branch Post Office, Borough of Manhattan, City of New York (the same being one of the regular branch post offices of the New York City General Post Office), enclosed in a securely closed registered envelope with the postage thereon prepaid, addressed to the said Attorney General at his office, Washington, D. C., that being the address designated by him.

Paul C. Swartwood.

Sworn to before me this 9th day of March, 1921. Thomas P. Mackey, Notary Public, Kings County. Kings Co. Clerk's No. 393. Reg. No. 1221. Certificate filed in New York County. N. Y. Co. Clerk's No. 521. Reg. No. 1481. My Commission expires March 30, 1921. (Seal.)

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

Paul C. Swartwood, being duly sworn, deposes and says: That he is over the age of 20 years; that he is a clerk in the employ of Harrington, Bingham & Englar, proctors for the libellant herein.

That on the 28 day of February, 1921, at 3.30 o'clock in the afternoon of said day he served a true copy of the libel in the above action on the United States Attorney, at his office at No. 45 Broadway, New York City, by delivering and leaving same personally with the Managing Clerk of said office at said time, also receiving admission of service on one copy thereof.

Paul C. Swartwood.

Sworn to before me this 9th day of March, 1921. Thomas P. Mackey, Notary Public, Kings County. Kings Co. Clerk's No. 393. Reg. No. 1221. Certificate filed in New York County. N. Y. Co. Clerk's No. 521. Reg. No. 1481. My Commission expires March 30, 1921. (Seal.)

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION FOR LIBELLANT'S COSTS

Whereas, a libel was filed in this Court on the 19th day of February, 1921, by L. Littlejohn & Company, Inc., against United States of America, in a cause of collision and cargo damage — and maritime, for the reasons and causes in said libel mentioned, and praying that the same may be condemned and sold to answer the prayer of the libellant, and the said libellant and the Royal Indemnity Company, a New York Corporation having an office and place of business at No. 84 William Street, New York City the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellant or its surety, execution may issue against their goods, chattels and lands for the sums of One hundred and 00/100 Dollars.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the stipulators undersigned shall be and are bound in the sum of One hundred and 00/100 Dollars, conditioned that the libellant above-named shall pay all such costs as shall be awarded against it by this Court or in case of appeal by the Appellate Court.

Royal Indemnity Company, by J. P. Huntting, Resident Vice-President. August Westphal, Assistant Secretary.

Taken and acknowledged before me, this 19th day of February, 1921. ——— ———.

Bond No. SX-61832. #83343. mcb.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF WANT OF JURISDICTION

SIRS: Please take notice that the suggestion of want of jurisdiction filed herein and of which the annexed is a copy, will be brought on for hearing at a stated term for the hearing of motions of the United States District Court held in and for the Southern District of New

York in the United States Court House and Post Office Building, Borough of Manhattan, City of New York, on Thursday the 14th day of September, 1922, at the opening of court on that day or as soon thereafter as counsel can be heard.

Dated New York, N. Y., August 31, 1922.

Yours, etc., William Hayward, United States Attorney for the Southern District of New York, appearing specially and not otherwise as proctor for the United States of America, as owner of the Steamship "Antigone."

Office & Post Office Address: Room 700, 45 Broadway, Borough of Manhattan, City of New York.

To Messrs. Bigham, Englar & Jones, Proctors for Libellant, 64 Wall St., New York, N. Y.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUGGESTION OF WANT OF JURISDICTION

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Now comes William Hayward, United States Attorney for the Southern District of New York, appearing specially and not otherwise as proctor for the United States of America, owner of the U. S. A. T. "Antigone," herein proceeded against for the purpose of questioning the jurisdiction of the court in this cause and respectfully suggests to the Court that this Honorable Court is without jurisdiction to proceed herein, for the reason that the said U. S. A. T. "Antigone" was, at the time of the collision mentioned and set forth in the libel herein filed, the property of the United States of America, in its possession and control and employed as a Government vessel in public service for national uses and purposes.

That the status of the U. S. A. T. "Antigone" was as follows:

1. That the U. S. A. T. "Antigone" was formerly the North German Lloyd liner "Neckar" of 9,385 gross tons and had taken refuge in a port of the United States prior to the time that war was declared upon Germany.

[fol. 42] 2. By Act of Congress of May 12, 1917, the President was directed to take over to the United States the possession and title of any vessel within the jurisdiction thereof, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States might be at war, or was flying the flag of or was under register of such nation or political subdivision or municipality thereof.

3. That by executive order made by the President of the United States of America, dated June 30, 1917, acting pursuant to the authority vested in him by the joint resolution adopted by Congress and approved by the President on May 12, 1917, entitled "Joint Resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or under register of any such nation, and for other purposes," and thereafter, pursuant to the Statute and Proclamation, as aforesaid, the title and possession of the said Steamship "Antigone" was taken over by and vested in the United States of America.

4. That on the date of the collision alleged in the libel herein filed, the said U. S. A. T. "Antigone" was under the ownership and in the possession of the United States of America and that title thereto was vested in the United States of America.

5. That on the date of the collision alleged in the libel filed, the [fol. 43] said U. S. A. T. "Antigone" was operated by the United States of America pursuant to the authority conferred by the joint resolution of Congress approved by the President on May 12, 1917, and the executive order of the President dated June 30, 1917, solely in the transportation of supplies and troops of the United States Army to and from ports in the United States of America to ports in England and France; that the said U. S. A. T. "Antigone" was operated as aforesaid by the United States of America, was navigated and manned by officers and men employed by the United States, and that the said vessel was allocated by the United States to the United States War Department.

6. That on the date of the collision alleged in the libel filed herein, to wit; on the night of October 9th, 1919, the U. S. A. T. "Antigone," operated by the United States of America as a public vessel in public service, and navigated and manned as aforesaid, was on a voyage from the port of New York to the port of Brest in France.

Wherefore, the said William Hayward, United States Attorney for the Southern District of New York, without submitting the rights of the United States to the jurisdiction of this Court, but appearing specially as aforesaid, and not otherwise, for the United States of America, as owner of the Steamship "Antigone", prays that the libel filed in the above entitled cause, and every and all proceedings had thereunder, be dismissed for want of jurisdiction, and that such [fol. 44] order be entered in the premises, as may be proper.

William Hayward, United States Attorney for the Southern District of New York, appearing specially and not otherwise, Proctor for Respondent.

Office & Post Office Address: Room 700, 45 Broadway, Borough of Manhattan, City of New York.

[fols. 45-60] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONSOLIDATING CAUSES FOR TRIAL

[fol. 61] On motion of Bigham, Englar & Jones, Kirlin, Woolsey, Campbell, Hickox & Keating and Carter, Ledyard & Milburn, proctors for the libellants, and on the consent in open court of Wil-[fols. 62 & 63] liam Hayward, Esq., United States Attorney for the Southern District of New York, appearing specially on behalf of the United States of America, and it appearing that all the above entitled causes arise out of the same collision on the 9th day of October, 1919, between the steamships "Antigone" and "Gaelic Prince" and raise similar questions of fact and law, and good cause appearing therefor, it is hereby

Ordered, that the above entitled causes be and they hereby are consolidated for trial, and that the consolidated cause be entitled L. Littlejohn & Co., Inc., v. United States of America, docket number 77-57.

C. M. Hough, U. S. C. J.

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING LIBELS

On motion of Messrs. Bigham, Englar & Jones, Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating, and Messrs. Carter, Ledyard & Milburn, proctors for libellants herein, and after hearing William Hayward, United States Attorney for the Southern District of New York in opposition, and it appearing that no answer has been filed to said libel, and good cause appearing therefor, it is hereby

Ordered that the second paragraph of each and every all and singular, the libels on file in the above consolidated cause be amended to read as follows:

[fols. 65 & 66] "Second. At all the times mentioned herein prior to the 13th day of October, 1919, and particularly on the 9th day of October, 1919, the date of the collision hereinafter mentioned, the steamship 'Antigone' was owned by a private person or merchant who was solely entitled to the immediate and lawful possession, operation, and control of said vessel. At no time prior to said 13th day of October, 1919, was the said Steamship 'Antigone' owned, either absolutely or pro hac vice, by the United States of America, nor by any corporation in which the United States of America or its representatives owned the entire outstanding capital stock, nor lawfully in the possession of the United States of America or of

such corporaton, nor lawfully operated by or for the United States of America or such corporation.

"On the 13th day of October, 1919, the respondent United States of America became, ever since has been, and now is in the lawful possession of the Steamship 'Antigone', but at no time has the United States of America held the legal title to or been the absolute owner of said steamship 'Antigone'.

"At the present time the steamship 'Antigone' is employed as a merchant vessel and is now in the port and Southern District of New York, and if said steamship 'Antigone' were privately owned, operated or possessed a libel and proceeding in rem in admiralty could now be maintained against her. The libellant hereby elects that this suit proceed in accordance with the principles of a libel in rem."

Dated New York, September 26, 1922.

C. M. Hough, United States Circuit Judge.

[fol. 67] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS AND ANSWER OR TRAVERSE TO THE SUGGESTION OF WANT OF JURISDICTION

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libellants in the above entitled consolidated cause except to the pleading or paper entitled Suggestion of Want of Jurisdiction, filed herein by the United States of America through the United States Attorney for the Southern District of New York, as follows:

I. The said suggestion, being neither an Exception nor an answer to the amended libel, admits that the amended libel states facts [fol. 68[sufficient to show jurisdiction and constitute a cause of action, and that the facts alleged in the amended libel are true.

II. The said suggestion does not state facts sufficient to show want of jurisdiction or to constitute a defense to the libels herein.

A. The said suggestion does not allege facts sufficient to show that the United States of America, on the 9th day of October, 1919, was the owner or lawfully in possession of the steamship Antigone.

1. The said suggestion does not allege that any judicial proceedings, either in a Prize or any other Court, were instituted by the United States of America or anyone to detain, seize, arrest, condemn, forfeit or confiscate said steamship Antigone, or to determine her enemy or non-enemy ownership, or whether she had committed any offense justifying her seizure, condemnation or confiscation.

2. The said suggestion does not allege that the seizure therein mentioned, on which the United States must base any right it may have in relation to the vessel, was made prior to the collision on the 9th day of October, 1919.

III. The said suggestion is substantially not a pleading but a claim by the United States that it was unlawfully in possession of [fol. 69] the steamship Antigone on the 9th day of October, 1919, prior to the commencement of this suit. The United States, as a wrongdoer or unlawful possessor, is estopped and precluded from taking advantage of its own wrong and from attempting to defeat the jurisdiction of an Admiralty Court in a suit, according to the principles of suits in rem, by filing a claim or suggestion that the vessel or res involved was, prior to the institution of the suit and prior to the time that this Court acquired jurisdiction, in the unlawful possession of the United States and therefore immune. Moreover, as the amended libel alleges and admits lawful possession of the vessel by the United States at the time of the commencement of this suit, the filing of such a claim or suggestion is unnecessary and improper.

Without waiving the foregoing exceptions, the answer and traverse of the libellants to said suggestion of want of jurisdiction,

First. Denies that on the date of the collision alleged in the libel filed herein, to-wit, the 9th day of October, 1919, the steamship Antigone was under the ownership and/or in the lawful possession of the United States of America and/or that title was vested in the United States of America and/or that said vessel was the property of the United States of America and/or in its lawful possession and/or control and/or lawfully employed as a Government vessel in public service for national uses and purposes.

[fol. 70] Second. Denies that, on or prior to the 9th day of October, 1919, the steamship Antigone, which was or had been seized pursuant to the Joint Resolution of Congress of May 12, 1917 and/or the executive order of the President of the United States of America dated June 30th, 1917; and denies that, pursuant to said statute and executive order, or otherwise, the title and/or lawful possession of the said steamship "Antigone was taken over by and/or vested in the United States of America on or prior to said 9th day of October, 1919. The libellants deny particularly that any seizure or detention or taking over or vesting of title and/or possession of the steamship Antigone was made or effected on or prior to the 9th day of October, 1919 or at any time prior to the date hereof, by any judicial proceedings either in a Prize or any other Court instituted to tender, seize, arrest, condemn, forfeit or confiscate said steamship Antigone or to determine her enemy or non-enemy ownership or whether she committed any offense justifying her seizure, condemnation or confiscation.

Wherefore, the libellants pray that the said suggestion of want of jurisdiction be dismissed and that such other order be entered in the premises as may be proper.

Dated September 27th, 1922.

Bigham, Englar & Jones, Kirlin, Woolsey, Campbell, Hickox & Keating, Carter, Ledyard & Milburn, Proctors for Libellants.

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER PERMITTING FILING OF SUGGESTIONS OF WANT OF JURISDICTION TO AMENDED LIBELS

An order having been entered herein on September 26, 1922 permitting libels in the above entitled consolidated cause to be amended in manner and form as set forth in said order, now on motion of William Hayward, United States Attorney for the Southern District of New York, specially appearing as proctor for the United States and without submitting it to the jurisdiction of the Court, it is

Ordered that the suggestions of want of jurisdiction heretofore filed in the various causes consolidated as above set forth, be and the same hereby are permitted to stand with like force and effect as to the amended libels as if filed anew.

Dated: New York, September 27, 1922.

C. M. Hough, U. S. C. J.

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM ON SUGGESTION OF LACK OF JURISDICTION—September 29, 1922

I have drawn an order which is almost self-explanatory, yet I may state my reasons for so doing.

The amended libel seeks by positive averment to put the United States out of Court so far as sovereign immunity is concerned.

Nevertheless the United States comes in by this suggestion and asserts an immunity which rests either upon ownership of the Antigone or possession, control and operation thereof.

Nowhere does the suggestion use the words "lawful ownership," [fol. 73] or property or possession; but it is of course assumed that any unqualified assertion of ownership or the like is an allegation of lawful ownership, etc.

Every variant of this allegation is categorically denied by the traverse or answer.

The Court may entertain the belief (I do) that it is almost matter of public knowledge as to just how this vessel came into the possession of the United States, what had been done with her and for what she was being used when in collision with the Gaelic Prince.

The Court may believe (as I do) that the single and ultimate question here is whether vessels with the Neckar-Antigone's history could be said to be within the meaning of the law vessels belonging to the United States or public vessels of the United States.

But I am not authorized to take judicial cognizance of this matter, and I am persuaded that the documents and affidavits submitted on the suggestion-hearing, do not and cannot tell the whole story. I should want to know what the United States had done to the vessel, whether it had been re-built and re-conditioned, how it was manned and especially what if any steps had been taken by the original [fol. 74] private German owner to maintain or re-assert any claim of ownership in the original Neckar. In short I do not think that a sufficient ground-work is laid for the argument made at bar.

The practice of making suggestions like this has undoubtedly grown. It seems to me it is bad practice. In this action in personam the same issues could (and I think should) have been raised by an answer containing exceptions, or rather exceptive allegations; then a preferential trial could have been asked on the exceptive allegations relating to jurisdiction.

The best analogy to such a thing as this "suggestion" on the instant side is the trial of a claim. That is to say, it is old practice that a person proffering a claim to a vessel in rem may be called upon in limine to thresh out his right to claim. So here the United States must first thresh out its right to be dismissed without trial; and I have endeavored to frame an order which will produce a record upon which if decision is given for the Government, appeals can safely be made.

C. M. Hough, U. S. Circuit Judge.

[fol. 75] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ON SUGGESTION OF WANT OF JURISDICTION—September 29, 1922

This cause having come on to be heard upon a "suggestion of want of jurisdiction" filed by the United States of America, the following situation has been shown to the Court:

By the amended libel herein it is asserted that on the 9th day of October, 1919 (being the date of the collision complained of in the libel) the steamship Antigone was owned by a private person or merchant who was solely entitled to the immediate and lawful posses-

sion, operation and control thereof. Also that at all times prior to the 13th October, 1919, said Antigone was not owned either absolutely or pro hac vice by the United States of America.

By its said suggestion the United States has asserted herein that at the date of said collision, to wit: October 9, 1919, said Antigone was under the ownership and in the possession of the United States [fol. 76] of America, and that title thereto was vested in said United States; also that on said date said Antigone was operated by the United States of America as a public vessel in public service; and it further appears that said suggestion is made by the United States appearing specially for the purpose of objecting to jurisdiction and as the owner of said Antigone.

And thereupon the libellant herein has filed exceptions and an answer to said suggestion wherein and whereby said libellant denies that on 9th October, 1919, said Antigone was under the ownership and/or in lawful possession of the United States; and/or that title to said vessel was then vested in the United States or that said vessel was then the property of the United States or in the lawful possession and control of said United States.

In support of said suggestion the United States has filed the following documents:

1. Certified copy of an order transferring Antigone to Army Transport Service, dated September 24, 1919;

2. Certified copy of joint resolution adopted by Congress and approved by the President May 12, 1917;

3. Executive order issued August 29, 1917;

4. Affidavit of Frank H. Phipps, Jr., Major C. A. C., verified 26th September, 1922.

And libellant has filed in opposition to said suggestion the affidavit of Bernard M. Baruch, verified September 27, 1922.

[fols. 77–79] Now, upon consideration of the documents above enumerated, and after hearing argument of counsel, it is by the Court

Ordered: 1. That the issue raised by the suggestion above mentioned and the traverse thereof be tried by this Court, and that for the purpose of such trial this cause be placed at the head of the first Admiralty Trial Calendar on or after the first day of the term of October, 1922.

2. That the issue of fact to be tried herein is whether on 9th October, 1919, said S. S. Antigone was owned by the United States; and/or whether on said date title to said vessel was vested in the United States; and/or whether on said date said vessel was in the possession of the United States.

3. That upon the trial of said issue the burden of evidence shall in the first instance be upon the United States, which shall be obliged to produce evidence showing the facts, if any, which resulted in the alleged ownership, title and control of said United States in and of said Antigone.

4. That from the facts as found the Court will draw the legal inference or answer the legal question as to whether there was owner-United States; and/or whether on said date said vessel was in the United States on 9th October, 1919.

C. M. Hough, U. S. Circuit Judge.

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPEARANCES OF COUNSEL

Messrs. Bigham, Englar & Jones (Mr. Jones and Mr. James W. Ryan) for the Libellant.

John Hunter, Esq. and L. P. Scott, Esq. for the United States of America.

ARGUMENT OF COUNSEL

Mr. Jones: In L. Littlejohn & Company, Inc., Libellant against the United States of America, Consolidated Cause No. 77-57, on behalf of the libellant I offer in evidence the affidavit of C. J. Stimming.

It is received in evidence without objection.

[fol. 81] Mr. Jones: The United States do not call on us to produce him for cross examination.

Mr. Jones: I wish to make a motion for an order requiring the United States of America to deposit in Court the appraised value of the steamship Antigone (ex Neckar) as appraised by the Government Board of Survey in accordance with the provisions of the second section or paragraph of the Joint Resolution of Congress of May 12, 1917, authorizing the President to take over the immediate possession and title to enemy owned vessels in United States ports; or

(2) require the United States of America to amend its claim or suggestion of want of jurisdiction, by adding a prayer that the said vessel be detained, condemned, or requisitioned; or

(3) require the United States of America otherwise to institute proceedings on the prize or admiralty side of this court for the seizure, detention, confiscation, condemnation, or requisition of said vessel; or

(4) require the United States of America to withdraw its claim, or [fol. 82] suggestion of want of jurisdiction, as owner or lawful possessor of said vessel on October 9, 1919.

The grounds of this motion are among others, the pleadings and proofs on file herein, and particularly the admissions and allegations by the United States of America in its said claim or suggestion of want of jurisdiction, that although certain persons in the employ of the United States Shipping Board seized or captured said vessel, said persons did not, in accordance with the well-settled principles of

international and municipal law, promptly or at any time thereafter deliver possession and control of said vessel to a Marshal of a prize court, or deposit her appraised value in a prize or admiralty court.

Mr. Hunter: I suggest that that matter be determined on the final disposition of this matter before your Honor.

Mr. Jones: I ask leave to file the motion and will be entirely willing to have it argued later.

The Court: File the motion.

Mr. Jones: Another motion for the libellant; We move that an [fol. 83] order be entered transferring said consolidated cause to the prize side of this Honorable Court; and that said cause proceed henceforth as a proceeding in prize by the United States of America, as captor, against the Steamship Antigone for the detention, condemnation or requisition of said vessel and said libellants further move that an order also be entered that the suggestion filed herein by the United States of America alleging that the Steamship Antigone then named the Neckar was owned by an enemy private corporation and was in a United States port at the outbreak of war and at the time of the passage of the Joint Resolution of Congress of May 12, 1917, and alleging that the said vessel was thereupon seized or captured by employees of the United States or of the United States Shipping Board, and praying or asking that this court grant, recognize, establish or decree title or ownership of said vessel in or to the United States of America, be regarded and established henceforth as the libel in said prize proceeding.

And said libellants further move that an order be entered herein requiring the United States of America to deposit forthwith and at [fol. 84] once in the registry of this Court the value of the Steamship Antigone as appraised by the Government Board of Survey pursuant to section or paragraph two of said Joint Resolution of May 12, 1917.

And said libellants further move that an order be entered herein that all the libels in said consolidated cause of collision in admiralty be regarded and established henceforth as intervening claims or petitions in said prize proceedings.

I ask leave to file that motion.

The Court: It may be filed.

Mr. Jones: I wish to make a third motion:

In accordance with the provisions of Section 4625 of the Revised Statutes of the United States, the claimants and libellants above named as claimants of a jus in re in the steamship Antigone, hereby respectfully move for a monition to show cause why proceedings in prize in the above entitled court shall not be commenced.

The said claimants and libellants further respectfully move that an order be entered directing that said monition when issued be [fol. 85] served on the United States Attorney for the Southern District of New York, and on the Secretary of the Navy of the United States, as well as on such other persons as the court may order to be notified.

The Court: It may be filed.

Adjourned to October 11, 1922.

New York, October 11, 1922.

Met pursuant to adjournment; present as before.

ANTHONY V. LYNCH, JR., is sworn.

Mr. Hunter: I offer in evidence a certified copy of order of the United States Shipping Board dated July 14, 1917, authorizing Mr. Anthony V. Lynch of New York as the agent of the United States Shipping Board to take possession of and title to the steamship Neckar, together with his return thereupon written, with a further return, likewise certified annexed to the original order.

Mr. Jones: I object to the document offered in evidence insofar as [fol. 86] it purports to state any conclusions of fact.

Objection overruled.
Exception.
It is marked Exhibit 1.

Mr. Hunter: May I reserve all rights to object when motions come on, and set forth in full my reasons why any motion should not be entertained?

By Mr. Jones:

Q. As I take it from the document which has been tendered to me, Exhibit 1 in this cause, you went to Norfolk on July 17, 1917 and you went to the Navy Yard at Norfolk; is that correct?
A. Yes.
Q. And you found the Steamship Neckar at the Navy Yard?
A. At the Navy Yard.
Q. Physically in the Navy Yard?
A. Physically in the Navy Yard.
Q. You went on board the Neckar?
A. I did.
Q. Did you find anybody on board the Neckar?

Mr. Hunter: I object to this line of testimony as immaterial and not within the issues, and ask that the objection go right along.
Objection overruled.
[fol. 87] Exception.

A. To the best of my recollection, at the time that I went on board the Neckar the only ones on board that I saw were men in working costume.
Q. By "in working costume," what do you mean?
A. Blue dungarees or overalls, or some costume of that sort.
Q. Did you see any German officers of the ship on board?

Mr. Hunter: Objected to.

Objection overruled.
Exception.

A. Not to recognize them as such.

Q. On July 17, 1917, the Norfolk Navy Yard was, I suppose, carefully guarded by marines and other troops when you went there, was it not, by the United States?

Same objection, ruling and exception.

A. Well, I presume so; I don't recollect now whether I had any difficulty in getting in after I presented my credentials.

Q. When you got on board what did you do?

A. I had in my possession an original and a copy of the order taking over the vessel, a photostatic copy, of which you have there.

[fol. 88] Q. You mean you had in your possession this document which is marked "Order United States Shipping Board, Washington, D. C., July 14, 1917"?

A. Yes.

Q. That is the only document you had in your possession?

A. I think as I remember that I had also the return which is affixed to that.

Q. That was a blank paper, was it not?

A. That was a blank paper, and I affixed the original order by means of a thumb tack to some piece of boarding on board the ship and then recited a formula to the effect that I was taking possession of the ship in the name of the President of the United States and the United States Government. I then removed the original order and put the copy of it, an exact copy, in a frame and attached that frame to the ship.

Q. What did you do after that?

A. On board the ship?

Q. Yes.

A. Nothing further on board the ship.

Q. Did you leave the ship then?

A. I left the ship then.

Q. And returned to New York?

A. I am not quite clear whether I returned to New York or went on to Baltimore.

Q. How long altogether were you on board the Neckar?

A. Not to exceed half an hour.

[fol. 89] Q. As a matter of fact the ship was in the United States Navy Yard at Norfolk, was she not?

A. Yes.

Q. And it was war time and we all know that there were a lot of troops around there?

Mr. Hunter Objected to.

Objection overruled.

A. I presume there were. I couldn't say now what armed force I saw around there. I can say, however, that I saw sentries at the gate.

Q. United States sentries?

A. Yes.

Q. Either naval men or marines, you don't know which?

A. I think they were marines.

Q. Were you opposed by anyone when you went there to go on board the ship or to recite this formula or while you tacked this paper up?

A. Not after I showed my credentials, no.

Q. To whom did you show your credentials?

A. The first person I met going on board the ship.

Q. Do you know who he was?

A. No, I do not.

Q. Was he in United States naval uniform?

A. I don't think he was; to the best of my recollection the only ones that I saw on board the ship were in working clothes.

[fol. 90] Q. Did you present your credentials to workmen?

A. To the first man that I met after going up the gangplank.

Q. Was he a United States employee?

A. That I don't know.

Q. You have told us everything that you did while you were there, have you not?

A. On board the ship, yes.

Q. Or was there anything you did in connection with the ship at any other time, other than what you have told?

A. Except to swear to my return.

Adjourned till 2.30 p. m.

[fol. 91] Met pursuant to adjournment at 2.30 p. m.; present as before.

ARGUMENT OF COUNSEL

Mr. Hunter: The United States Attorney appears specially and does not submit itself to the jurisdiction of this Honorable Court in this proceeding.

Mr. Jones: There is a motion here to show cause why you should not take prize proceedings, and I suggest that all the evidence that you have in this case shall be considered as proof which you offer in evidence pursuant to that order in the event that the Court does subsequently enter it.

Mr. Hunter: No; I am going to stand on these motions in the proceedings and the lack of jurisdiction to making the transfer.

Mr. Jones: If you decide that this order to show cause should be entered will your Honor then hold the matter open so that the Government will be compelled to offer such a return as you think proper?

The Court: Yes.

Mr. Hunter: May I have marked certified copy of Executive [fol. 92] Order of June 30, 1917, which was offered in evidence before Judge Hough?

It is marked Government Exhibit 2.

Mr. Hunter: I also offer in evidence a further executive order certified by the Secretary of State August 29, 1917 directing that certain vessels be transferred by the Shipping Board to the United States Navy, in which list of vessels appears the Antigone, ex-Neckar.

It is marked Government Exhibit 3.

Mr. Ryan: The section 4625 of the Revised Statutes provides that if the Government takes property to its use without first filing a libel for its condemnation and doesn't institute its proceedings within a reasonable time any claimant against the vessel can file a libel in any district court of the United States asking for a monition to issue directed to the United States Attorney and to the Secretary of the Navy that they show cause why prize proceedings should not be begun. We have made that motion and the United States Attorney is in court, and I ask that the Court now order that the monition issue, and then that all the evidence that Mr. Hunter [fol. 93] and we are introducing shall be evidence in support of the order to show cause.

The Court: I think this should be considered in on that proceeding if I order the proceeding.

Mr. Hunter: If your Honor has jurisdiction to do it.

The Court: I realize that. But if I do make that order it will save time. I therefore think it will be wise if you make some stipulation about that. I will direct that a monition issue directed to the United States Attorney for the Southern District of New York and to the Secretary of the Navy of the United States to show cause why prize proceedings should not be commenced against the steamship Antigone ex-Neckar.

Mr. Jones: In view of that monition we shall ask the Court to adjourn the taking of further evidence in the case until the monition has been issued and we have had an opportunity to serve the Secretary of the Navy and the United States Attorney.

The Court: You want to adjourn the whole thing?

Mr. Jones: Yes sir.

Mr. Staley: We have no objection. If your Honor will enter an order we will be bound by it.

[fol. 94] Mr. Jones: May the evidence that you are offering now be treated as being in evidence on the subsequent proceedings, too?

Mr. Hunter: No.

Mr. Jones: I renew my application to adjourn.

The Court: They say they will so consider it. They say you can rely upon them that they will not burden you by doing it all over again.

Mr. Staley: If you want to offer this in evidence we will stipulate that it is the evidence that you want to offer. We will stipulate that you may use it if you want to.

Mr. Jones: I renew my motion.

The Court: I think you had better go on.

Mr. Hunter: I also offer in evidence certified copy of a dispatch

which was presented to Judge Hough at the prior hearing, from the Commissioner of the Cruiser Force directing the Antigone to be placed out of commission, and transferred to the Army Transport Service at 3.30 P. M. September 24, 1919.

Mr. Jones: So that the record may be entirely clear I understand [fol. 95] the papers which you have now offered in evidence are identical or are the same papers which you offered in evidence before Judge Hough?

Mr. Hunter: The very same, yes, sir.

The paper is marked Government Exhibit 4.

Mr. Hunter: I also offer in evidence affidavit of Frank H. Phipps, Jr., Major of Coast Artillery Corps, United States Army, sworn to the 26th day of September, 1922, which was also offered in evidence before Judge Hough.

It is marked Government Exhibit 5.

Mr. Hunter. I offer in evidence copy certified by the Secretary of the Navy of the order of the President appointing a board for the purpose of carrying out the provisions of Public Resolution No. 2, approved May 12, 1917, for the purpose of appraising the Antigone, ex-Neckar, and also certified copy of report of the Board of Appraisers, fixing the value of the Neckar at $424,260, also under the same certification a list of the names of former German ships, together with the names given those ships after being taken over, in which it appears that the Neckar became the Antigone.

The paper is marked Government Exhibit 6.

[fol. 96] Mr. Hunter: The last exhibit being marked No. 6 consists of four pages.

The report of the appraisers is offered in evidence and is marked Government Exhibit No. 7.

Mr. Jones: With reference to Exhibit No. 6 I object to the appraisal of the Naval Board as indicating any real or true value of the steamship Neckar.

Objection overruled.
Exception.

Mr. Jones: I reserve the right to introduce other evidence as to the true value of that vessel.

The Court: Very good.

Mr. Hunter: I offer in evidence certified copy of the certificate of registration dated May 3, 1921, showing the vessels enumerated under the names of the United States of America, and that her name was changed from Antigone to Potomac.

Mr. Jones: I object to the document offered in evidence on the ground that it is dated long since this suit was commenced and it recites facts which occurred, if at all, after the action was commenced.

Objection overruled.
Exception.

[fol. 97] Marked Government Exhibit 8.

Mr. Jones: Your Honor is not passing on these objections finally, but is simply overruling them for the time being?

The Court: That is true.

Mr. Hunter: I offer certificate from the Secretary of State of the United States dated October 5, 1922, in which it appears that no application, either directly or through the German Government for the return of the steamship Antigone, former Neckar, has been made; nor that any claim for compensation has been filed by the former owners.

Mr. Jones: I object to this document because it is insufficient proof to establish whether any such claim was made or was not made, and Judge Hough directed that the Government have the burden of proof showing whether such claim was made or not.

Objection overruled.
Exception.

It is marked Exhibit 9.

[fol. 98] Testimony for the United States

BENJAMIN D. PENDER, being duly sworn and examined as a witness for the United States, testifies:

By Mr. Scott:

Q. What is your occupation?

A. Naval officer in charge of the passenger ships and records for the United States Shipping Board.

Q. How long have you been in that position?

A. Approximately two years.

Q. Have you at any time had anything to do with repairing and conditioning of any of the ex-German ships?

A. Practically all that have been reconditioned as passenger ships, except the Leviathan.

Q. Do you know the former transport Antigone?

A. I do.

Q. Did you have any connection with her so far as repairs are concerned?

A. I did, but I will have to make an explanation, because about the latter part of 1920 this vessel was turned over, somewhere in 1920, from the Navy to the Shipping Board. She was then tied up and awaiting disposition, and on May 28, 1920 a contract was entered into between the United States Shipping Board and the United States Mail Steamship Company——

[fol. 99] Mr. Jones: I am going to move to exclude all evidence in regard to the contract between the United States Mail Steamship Company and the United States, as irrelevant to the issues in this case.

Objection overruled.
Exception.

Q. Will you confine yourself to the history of the repairs that were made to the Antigone?

A. That was part of my instructions; the United States Mail Steamship Company had made the specifications——

Mr. Jones: I ask that what this witness has said be stricken out.

The Court: I think everything this witness has said had better be stricken out.

By the Court:

Q. Confine yourself to the repairs on the Antigone, if any repairs were made on her.

A. The vessel was reconditioned for passenger service.

By Mr. Scott:

Q. At approximately what cost?

A. The initial cost of the contract being a time and material job, was about $400,000, of which a certain amount has been paid.

[fol. 100] Q. And these repairs were actually made?

A. These repairs were actually made by the New York Harbor Contracting Company.

Cross-examined by Mr. Jones:

Q. When were these repairs made?

A. In the early part of 1920.

Q. It was after May, 1920, wasn't it?

A. Yes.

Q. And therefore it was not the early part of 1920, but the summer of 1920?

A. It was about in May; some time soon after May.

Q. And continued until well into the autumn?

A. Oh, no; she was reconditioned in about sixty days.

Q. I believe you said the United States Mail Steamship Company paid a substantial part of the reconditioning expenses?

A. Well, if I answer that question I will have to explain a little. I have got to refer back to the contract.

Q. Who actually advanced the money?

A. It has never been advanced yet, all of it; a part of it was paid by the United States Mail Steamship Company.

By the Court:

Q. Part of it is unpaid still?

A. As I understand, there is quite an amount unpaid, still.

[fol. 100½] By Mr. Scott:

Q. The United States Mail Steamship Company was to be reimbursed by the United States Government for all these repairs, was it not?

A. Yes, and they were done under the approval of my department.

By Mr. Jones:

Q. Do you know where the Antigone was during February and March, 1921?

A. I can't tell from recollection.

Mr. Hunter: If your Honor is satisfied with the affidavit of Major Phillips, offered in evidence before Judge Hough, I may not have to call him.

Mr. Jones: I stated that I did not object to your offering that affidavit if you will permit us to offer in evidence the affidavit of Mr. Baruch. I will concede that Mr. Phipps will testify to what he says in his affidavit.

The Government rests.

[fol. 101] ARGUMENT OF COUNSEL

Mr. Jones: I have already offered in evidence the affidavit of Mr. Stimming, and I now offer in evidence the affidavit of Mr. Baruch, which was before Judge Hough at a former hearing.

It is marked Exhibit A.

Mr. Jones: If your Honor please now I should like to reserve the right to offer evidence as to the true value of the ship Neckar at the time she was seized and taken into custody by the United States Government.

Mr. Hunter: May I make this one suggestion as to Mr. Baruch's affidavit? We do not accept it as the proper interpretation, or the interpretation made by a charter party——

Mr. Jones: The Court will decide as to the proper construction to be put on it.

Mr. Hunter: As to introducing evidence about the proper value I do not object to its being put in before the Court to protect their interests, but as to the materiality of it who has a right to put in a claim of the value of the Antigone other than the owner or someone in privity with the owner?

Mr. Jones: I ask the Court if the Court will consider it when it considers all the questions in the case raised by the various motions [fols. 102–104] previously made. We think we should be permitted to show what the actual value of the vessel is. Will you concede, Mr. Hunter, that the proof which you have offered as to what was done by the Naval Board of Appraisers and the value found by that Board is not offered in proof of the value of the Antigone, but merely as to proof of the fact that such a proceeding was had?

Mr. Staley: No, I do not want to do that.
The Court: I will allow you to offer that evidence.
Mr. Jones: We can take that evidence by deposition, and when will your Honor make that monition returnable?
Mr. Hunter: I think before your Honor issues that monition the question of jurisdiction should be decided.
The Court: I will hold that motion to transfer this case and I will not grant a monition in the other until I decide this. It seems to me that is the sensible thing to do.

Adjourned till Tuesday, October 17, 1922.

[fol. 105] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS SUGGESTION OF WANT OF JURISDICTION AND ORDER DENYING SAME

Mr. Ryan: The libellants move to dismiss the Government's suggestion of want of jurisdiction and jurisdictional defense on the following grounds: First, the proof offered by the Government is insufficient to sustain its defense; Secondly, the proof is insufficient to show that the President took over the possession of the Steamship "Antigone" before October 9, 1919, when the collision occurred; Thirdly, the proof is insufficient to show that the United States Shipping Board performed before October 9, 1919, the duty delegated to it by the President of taking over possession of the "Antigone"; Fourthly, the proof is insufficient to show that A. V. Lynch ever took over possession of the "Antigone"; Fifthly, the proof is insufficient to show the performance by the President of the acts required by International Law and by the Statutes of Congress for the taking over by the President or the United States of lawful possession of or title to the "Antigone"; Sixthly, the Government has failed to comply fully with Judge Hough's order and memorandum describing in detail the proof necessary to support the Government's defense. Indeed, the proof on which the Government now rests is almost identically the same proof which was offered before Judge Hough and which he held was insufficient.
The Court: Motion denied.

[fol. 106] ARGUMENT OF COUNSEL

Mr. Ryan: May I have an exception?
The Court: Yes.
Mr. Ryan: The "Antigone" was under the charge of a pilot employed by the New York, New Jersey & Sandy Hook Pilot Association, at the time of the collision involved in this case. This pilot, whose name is Joseph T. Wood, is now on duty on the Pilot Boat off Sandy Hook, but we can have him here this afternoon or tomorrow

morning. The Master, John Chambers, of the "Antigone" testified under oath at a hearing held by the United States Government on October 10, 1919, that prior to sailing on the voyage on which the collision occurred Pilot Wood was assigned to the "Antigone" and that this pilot assumed full charge of the "Antigone" at the time she sailed and remained in charge until after the collision here involved. To save the expense and inconvenience of bringing the Pilot from his work we ask the Government to agree that the Master of the "Antigone" testified as I have stated and would so testify if called as a witness? I now show the United States Attorney a copy of the testimony of the Master of the Antigone just referred to. I now notice that the United States Attorney has a copy of his own.
[fol. 107] Mr. Hunter: The Government does not question the fact that the Master of the "Antigone" would again testify that the "Antigone" was in charge of Pilot Wood.

[fol. 108] [Title omitted]

JOHN FOSTER DULLES, called as a witness on behalf of the libellant, after being duly sworn, testified as follows:

By Mr. Ryan:

Q. What are your name, occupation and address?
A. John Foster Dulles, member of the firm of Messrs. Sullivan & Cromwell, 49 Wall Street, New York City.
[fol. 109] Q. What officer of the United States Government were you during the period following the Armistice on November 11, 1918, between the Allies and Germany?
A. I was financial adviser of the American Commission to negotiate Peace, appointed by the President of the United States. Other members were Bernard Baruch, Thomas W. Lamont, Norman Davis, and Vance McCormick.
Q. After the Armistice on November 11, 1918, did or did not you go to Paris and other parts of France with President Wilson as a member of the American Peace Commission?
A. I did.
Q. In order to function and give advice properly and completely as such financial adviser, was or was not it unnecessary for you to acquire information as to whether or not the President had taken over the possession or title to the German merchant vessels including the Antigone, which were interned in United States ports when the United States entered the War?

Mr. Hunter: Objected to as being a matter of State privilege.
The Court: Objection sustained.

Q. There was nothing confidential or privileged about that information, was there?

Mr. Hunter: Objected to on the same grounds.
The Court: Objection sustained.

[fol. 110] Q. Information that the President of the United States had formally admitted, stated, acknowledged and agreed, in France in the year 1920, that neither he nor the United States had ever taken over lawful possession of the German merchant vessels including the steamship Antigone ex Neckar which had been interned in United States ports, was published, was it not, as an item of news in the daily newspapers including the New York Times?

Mr. Hunter: Objected to on the same grounds.
The Court: Objection sustained.

Q. In the year 1920 in France, during the official sessions of that Peace Commission, including President Wilson, with the heads of the allied governments, particularly with Lloyd George, Prime Minister of Great Britain, Georges Clemenceau, Premier of France, and Premier Orlando of Italy, and the official representative of Germany, did or did not you hear Woodrow Wilson as President of the United States, formally admit, acknowledge and state to the assembly, including yourself, that neither he nor the United States had ever taken over lawful possession of the German merchant vessels including the steamship Neckar later known as the Antigone which were interned in United States ports at the outbreak of war between the [fol. 111] United States and Germany?

Mr. Hunter: Objected to on the ground that the disclosure of such information is a matter of diplomatic privilege which is unauthorized except by direction of the Secretary of State.

Mr. Ryan: Neither the President, the Secretary of State nor any other Cabinet officer or officer of an Executive Department of the United States has certified or suggested that the disclosure of such information would be incompatible with the public interest or is a matter of privilege. Indeed, it is common knowledge that President Wilson disclosed full information regarding these facts to the Associated Press and the New York Times for publication in the daily newspapers, and it was so published. In view of counsel's objection, however, I hereby request and demand that the United States Government's records showing these facts be produced, and particularly ask the production of the Government's records now in the possession of the United States Attorney for this district relating to the facts inquired about in the question.

It is important that the question asked the witness be answered for the following reasons:

At the time this libel was filed the Antigone was admittedly a mer- [fol. 112] chant vessel engaged in merchant service. After the collision on October 9, 1919, and before the libel was filed on March 4, 1921, the United States admittedly acquired lawful possession of the Antigone and had such possession at the time the libel was filed. Congress provided by Section 1 of the Suits in Admiralty Act of March 9, 1920, that in such a case the possession of the United States should not be interfered with by arrest of the vessel or attachment in rem, but that the libellant should have the practically equivalent substitute remedy of filing a libel against the United States in accord-

ance with Section 2 of the Suits in Admiralty Act. That has been done in this case. The situation now, therefore, is, as pointed out by Judge Hough in his memorandum opinion in this case, exactly the same as if this court, by process in rem, had arrested the Antigone as a privately owned merchant vessel. The libellants have also shown by the affidavit of C. J. Stimming, the Director General of the Nord Deutscher Lloyd, that that private corporation was the registered owner both absolutely and pro hac vice and the sole person entitled to the possession of the steamship Antigone on May 12, 1917, and at all times thereafter including the date of the collision, October 9, 1919, until just before the present libel was filed on March 4, 1921. The United States now appears as claimant of the vessel for the pur- [fol. 113] pose of establishing a privilege of sovereign immunity by attempting to prove that it was the owner and had lawful possession of the Antigone at the time of the collision on October 9, 1919. Counsel for the government have rested the government's right to lawful possession of and/or title to the Antigone on an alleged act of Woodrow Wilson as President of the United States on July 17, 1917, in taking over the immediate possession and/or title to the Antigone. The government, however, has not called President Wilson as a witness. It has rested its case almost altogether on a copy of a joint resolution of Congress of May 12, 1917, directing the President to take over the immediate possession and title to all enemy-owned vessels in United States ports; an order of John A. Donald, Commissioner of United States Shipping Board, dated July 14th, 1917, and the testimony of one Lynch that he went aboard the Antigone, then the Neckar, without first obtaining permission of her owner or lawful possessor, and tacked a slip of paper on a piece of boarding on the ship, reciting at the same time a formula to the effect that he was taking possession of the ship in the name of the President. Lynch further testified that he then did nothing further on board [fol. 113½] the ship but left her and returned to New York or Baltimore and that altogether he was on board the Neckar not exceeding half an hour and that he left no person representing him or the President on board. Lynch also testified that he never did anything further in connection with the ship except to swear to his return and that his only authority to do what he did was contained in the paper signed by John A. Donald purporting to act as the United States Shipping Board.

We now offer proof by this witness, particularly by the answer to the question just asked, that Woodrow Wilson, as President of the United States subsequently to the alleged act of taking possession, denied that he had ever taken over the immediate possession and/or title to the Antigone, and, moreover, at that subsequent time entered into an agreement for the purchase by the United States of the right to lawful possession and/or title to such interned German merchant vessels including the Antigone. This statement and denial of the President of the United States are offered by us as an admission by the respondent. The statement is also offered to contradict the government's evidence by showing the untruth of the allegation by the government in its suggestion of want of jurisdiction that the

President of the United States took over either the immediate posses-
[fol. 114] sion or the title to the Antigone in July, 1917, or at any other time.

The Court: Objection sustained.

Q. At the same time, and under the same circumstances, did or did not you hear Woodrow Wilson as President of the United States, formally admit and acknowledge before that assembly that neither he nor the United States had ever taken over lawful possession of or title to the German merchant vessels including the Neckar, later known as the Antigone, which were interned in United States ports at the outbreak of war between the United States and Germany?

Mr. Hunter: Objected to on the same grounds.
The Court: Objection sustained.

Q. In the year 1920 in France, did or did not Woodrow Wilson as President of the United States, in your hearing admit, acknowledge and state that neither the President nor the United States had taken over possession of the interned German merchant vessels including the Antigone because neither the President nor any officer of any of the Executive Departments of the United States, nor any person commissioned by the President, had taken over possession of those vessels including the Antigone?

[fol. 115] Mr. Hunter: Objected to on the same grounds.
The Court: Objection sustained.

Q. In the year 1920 in France, did or did not Woodrow Wilson as President of the United States in your hearing, admit, acknowledge and state that no proceedings had been taken by him or by any officer or agent of the United States in any prize or admiralty court, to have the interned German merchant vessels including the Antigone detained or condemned and, therefore, that neither the President nor the United States had ever taken over the possession or title to such interned German merchant vessels including the Antigone?

Mr. Hunter: Objected to on the same grounds.
The Court: Objection sustained.

Q. In the year 1920 in France, did or did not Woodrow Wilson as President of the United States, in your hearing, admit, acknowledge and state that neither he nor the United States had ever taken over lawful possession of the Antigone ex Neckar, because neither he nor any officer of an Executive Department of the United States had taken over such possession and because the independent establishment, the United States Shipping Board, by failing to pass a formal
[fol. 116] resolution appointing an agent to take over such possession of the Antigone, and by the failure of such agent to take over possession, had not performed its delegated duty?

Mr. Hunter: Objected to on the same grounds.
The Court: Objection sustained.

Q. In the year 1920 on the day before or shortly before the occasion already referred to, when President Wilson denied that he had ever taken over lawful possession of the Antigone ex Neckar, did or did not Woodrow Wilson, as President of the United States, say to you personally in Paris, France, that neither he nor the United States had ever taken over lawful possession of or title to the German vessels including the steamship Neckar, later known as the Antigone, which were interned in United States ports at the outbreak of war between the United States and Germany on April 6, 1917?

Mr. Hunter: Objection to on the same grounds.
The Court: Objection sustained.

[fol. 117] Q. In the year 1920 in France, did or did not Woodrow Wilson, as President of the United States, say to you personally that he had never commissioned or authorized the commissioning of the steamship Neckar, later known as the Antigone, as a public or other vessel of the United States?

Mr. Hunter: Objected to on the same grounds.
The Court: Objection sustained.

Q. In the year 1920 in France, did or did not Woodrow Wilson as President of the United States in your hearing and while you were present as financial adviser of the American Peace Commission, enter into an agreement with Great Britain represented by Prime Minister Lloyd George, France represented by Premier Georges Clemenceau, and Italy represented by Premier Orlando, whereby, in consideration of Great Britain, France and Italy, and the other Allies who had signed the Treaty of Versailles, granting to the United States lawful possession of and title to the German merchant vessels including the steamship Neckar, later known as the Antigone, which were in the United States ports at the outbreak of war between Germany and the United States, Woodrow Wilson, as President of the United States, agreed that the United States would pay to the Repa-[fol. 118] rations Commission to the credit of Germany and German Nationals, one hundred million dollars at the market value of said German merchant vessels including the Antigone?

Mr. Hunter: Objected to on the same grounds.
The Court: Objection sustained.

Q. Was or was not the agreement just referred to in writing?

Mr. Hunter: Objected to on the same grounds.
The Court: Objection sustained.

Q. In the year 1920 in France, did or did not Woodrow Wilson, as President of the United States, in your hearing and while you were present as financial adviser of the American Peace Commission, enter into a treaty with Great Britain represented by Prime Minister Lloyd George, France represented by Premier Georges Clemenceau, and Italy represented by Premier Orlando, whereby, in consideration of Great Britain, France and Italy, and the other Allies who had

signed the Treaty of Versailles, granting to the United States lawful possession of and title to the German merchant vessels including the steamship Neckar, later known as the Antigone, which were in the United States ports at the outbreak of war between Germany and [fol. 119] the United States, Woodrow Wilson, as President of the United States, agreed that the United States would pay to the Reparations Commission to the credit of Germany and German Nationals, one hundred million dollars as the market value of said German merchant vessels including the Antigone?

Mr. Hunter: Objected to on the same grounds.

The Court: Objection sustained.

Mr. Ryan: I request and demand that the Government produce the original or a copy of the agreement and/or treaty referred to in the previous questions, which was entered into between Woodrow Wilson as President of the United States, Lloyd George as Prime Minister of Great Britain, Georges Clemenceau as Premier of France, and Premier Orlando of Italy, whereby, in consideration of Great Britain, France and Italy granting to the United States lawful possession of and title to the German merchant vessels including the steamship Neckar, later known as the Antigone, which were in the United States ports at the outbreak of war between Germany and the United States, Woodrow Wilson, as President of the United States, agreed that the United States would pay to the Reparations Commission to the credit of Germany and German Nationals, one hundred million dollars as the market value of said German vessels in- [fol. 120] cluding the Antigone?

Mr. Hunter: I object to produce such agreement or treaty on the grounds already stated.

Mr. Ryan: You do not deny, do you, that the original and several copies of that agreement or treaty are in this Government's possession?

Mr. Hunter: I neither deny nor admit anything.

Mr. Ryan: I ask the Court to direct the Government to produce the agreement or treaty referred to.

The Court: Does the Government dispute the facts assumed in Mr. Ryan's questions?

Mr. Hunter: I haven't the complete Government's files regarding all the facts. However, from what files and information I have, the Government's position is that it rests on the ground that the disclosure of such information is a matter of State or diplomatic privilege.

The Court: As the Government has refused to produce the agreement or treaty, your rights are protected. My findings and ruling will be on the assumption that the facts inquired about in your various questions are true.

Mr. Ryan: I offer in evidence a copy of the agreement or treaty already described as printed and published in complete form in hæc verba in the New York Times exactly as delivered to a representative of that newspaper by President Wilson.

Mr. Hunter: Objected to on the same grounds.

The Court: Objection sustained.

[fol. 121] Q. In the year 1920 in France, did or did not Lloyd George as Prime Minister of Great Britain allege and charge in the presence and hearing of yourself, Woodrow Wilson as President of the United States, Premier Clemenceau of France and Premier Orlando of Italy and others, that neither the President of the United States nor the United States had ever acquired lawful possession of the German merchant vessels including the steamship Antigone ex Neckar, which were interned in United States ports at the outbreak of war between the United States and Germany because the prize court proceedings required by international law for the acquirement by the President or the United States of lawful possession of such vessels, had not been performed; and did not Woodrow Wilson as President of the United States admit such statement and charge?

Mr. Hunter: Objected to on the same grounds.
The Court: Objection sustained.

Q. In the year 1920 in France, did or did not Georges Clemenceau as Prime Minister of France, in the presence and hearing of yourself, Woodrow Wilson as President of the United States, Lloyd George as Prime Minister of Great Britain, and Premier Orlando of Italy and others, allege and charge that neither the President of [fol. 122] the United States nor the United States had ever acquired lawful possession of the German merchant vessels including the steamship Antigone ex Neckar, which were interned in United States ports at the outbreak of war between the United States and Germany because the prize court proceedings required by international law for the acquirement by the President of the United States of lawful possession of such vessels, had not been performed; and did not Woodrow Wilson as President of the United States admit such statement and charge?

Mr. Hunter: Objected to on the same grounds.
The Court: Objection sustained.

Mr. Ryan:

Q. Have you in your possession, and if so will you produce a true copy of the agreement and/or treaty between President Wilson, Lloyd George, Clemenceau and Orlando, which was referred to a few minutes ago?

Mr. Hunter: Objected to on the same grounds. I protest against the production by this witness of such agreement or treaty. That is a matter for the State Department.
The Court: Objection sustained.

[fol. 123] Ex. #1.—Oct. 11, 1922

United States [Vignette] of America

United States Shipping Board

October 3, 1922.

I hereby certify that the annexed Order of the United States Shipping Board dated July 14, 1917, authorizing Mr. Anthony V. Lynch as its agent to take possession of the vessel Neckar and Return dated July 25, 1917, by Anthony V. Lynch certifying that he carried out the instructions given in the aforementioned Order, are true and correct copies of the original documents on file in the United States Shipping Board.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the United States Shipping Board to be affixed, on the day and year first above written.

Carl P. Kremer, Assistant Secretary United States Shipping Board. (Seal of the United States Shipping Board.)

[fol. 124] Order

United States Shipping Board

Washington, D. C., July 14, 1917.

Mr. Anthony V. Lynch, New York, N. Y.

Sir: The President has issued an Executive Order authorizing the United States Shipping Board, on behalf of the United States, to take possession and title to the Neckar, now lying or shortly to arrive at Norfolk, Va., and you are hereby authorized and appointed by the United States Shipping Board as its agent to take possession of said vessel as contemplated in said Executive Order. Proceed aboard of said vessel at once and take possession of her in the name of the United States Shipping Board for and on behalf of the United States of America, affixing this Order on some conspicuous part of the ship, and leaving a true copy in its place when the original is removed. You are instructed thereupon to make Return, under oath, upon this Original Order of your action in the premises.

Very truly yours, United States Shipping Board, by John A. Donald, Commissioner.

To the United States Shipping Board:

I hereby that I have complied with the instruction contained in the foregoing Order.

Anthony V. Lynch.

July 17th, 1917.

[fol. 125] Return

UNITED STATES OF AMERICA,
Southern District of New York:

On this 25th day of July personally appeared before me Anthony V. Lynch, who, being personally known to me, and known to me to be the person named in the foregoing Order of the United States Shipping Board, and who, being by me first duly sworn, deposes and says: That, upon receipt of the foregoing Order of the United States Shipping Board instructing him to take possession as thereunder contemplated of the Neckar he carried out the instructions therein given as follows:

He found the Neckar which was a vessel covered by the Executive Order of the President of the United States and the resolution of the United States Shipping Board, lying in the Navy Yard or at Norfolk, in the State of Virginia, and within the territorial waters of the United States of America, and that he proceeded aboard of said vessel with the foregoing Original Order and did affix the same upon a conspicuous part of the vessel, and after removing the Original Order did leave a copy thereof in its place.

Anthony V. Lynch.

Subscribed and sworn to before me this 25th day of July, 1917. Alex Gilchrist, Jr. (Seal.)

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Martin T. Manton, one of the Judges of the District Court of the United States for the Southern District of New York, do hereby certify, that Alexander Gilchrist, Jr. whose name is subscribed to the preceding exemplification, is the Clerk of the said District Court, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the said exemplification is the Seal of the said District Court, and that the attestation thereof is in due form of law.

Dated New York, July 25th, 1917.

Martin T. Manton, United States District Judge.

[fol. 126] Ex. #3

The Joint Resolution of Congress of May 12th, 1917, "authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes" (Fed. Stat. Ann. 2nd Ed. Supp. 1918, p. 803) provides:

"That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under the register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

[fol. 127] Ex. 4—Oct. 11, 1922

I-12885

English.
From: Commander Cruiser Force, New York.
To: Opnav.

U. S. S. Antigone placed out of commission and transferred to Army Transport Service at 3.30 p. m. September 24, 1919.

Commander Cruiser Force.

9-24-19.

Certified to be a true copy. Paul P. Blackburn, Commander, U. S. N.

[fol. 128] Ex. #5—Oct. 11, 1922

PRINCE LINE, LTD., as Owner of the Steamship "Gaelic Prince".

vs.

UNITED STATES OF AMERICA, as Owner of the U. S. A. T. "Antigone"

STATE OF NEW YORK,
City of New York, ss:

Frank H. Phipps, Jr., being duly sworn, upon his oath deposes and says:

That he is a Major in the Coast Artillery Corps., United States Army; that on the 9th day of October, 1919, and prior and subsequent thereto, he was a Colonel in the Coast Artillery Corps of the United States Army and was Superintendent of Water Transportation in the Army Transport Service for the Port of New York; that as such Superintendent of Water Transportation he had charge and control of all of the army transports leaving the Port of New York; that on September 24, 1919 at 3:30 P. M. the United States Navy Transport and Cruiser Force placed out of commission the Navy Transport "Antigone", transferring the said vessel to the U. S. Army Transport Service; that on that date and at that time, he took charge and control of the "Antigone" and placed a master officers and crew on board the "Antigone", who were at that time sworn in in the U. S. Army Transport Service; that thereafter on the 9th day of October, 1919, he gave orders to the captain of the Army Transport "Antigone" to sail from the Port of New York and proceed to Brest, France, in order to transport troops from Brest to the United States of America; that on October 9, 1919 the United States Army Transport "Antigone" sailed pursuant to such orders and while proceeding down the Ambrose Channel on her way to sea, came in collision with the SS "Gaelic Prince"; that at the time of the collision the U. S. A. T. "Antigone" was an Army Transport in the possession and control of the United States under his supervision and was carrying no cargo except 61 cases, crates, [fols. 129 & 130] etc., of household effects consigned to Captain Ivan Jones, Asst. Military Attache in Berne, Switzerland, and further deponent sayeth not.

Frank H. Phipps, Jr., Major C. A. C., U. S. Army.

Subscribed and sworn to before me this 26th day of September, 1922. Fred'k. J. V. Wagner, Notary Public, Kings County, No. 249, No. 3064. Certificate filed New York County No. 125, No. 3144. My term Expires March 30, 1923. (Seal of Fred'k J. V. Wagner, Notary Public of Kings County.)

[fol. 131] Ex. No. 6—Oct. 11, 1922

United States of America,

[Vignette]

Navy Department

Washington, October 2, 1922.

I hereby certify that the annexed documents are true copies of records on file in the Office of the Chief of Naval Operations.

R. E. Coontz, Chief of Naval Operations.

Office of the Secretary

I hereby certify that Robert E. Coontz, who signed the foregoing certificate, was at the time of signing Chief of Naval Operations, and that full faith and credit should be given his certification as such.

In testimony whereof, I have hereunto set my hand and caused the Seal of the Navy Department to be affixed this second day of October, one thousand nine hundred and Twenty-two

Edwin Denby, Secretary. (Seal of Navy Department.)

[fol. 132] The White House,

Washington, D. C.

May 19, 1917.

To: Captain William A. Gill, U. S. N., President Board of Inspection & Survey, Navy Department (Secretary of the Navy).

Subject: Senior Member of Board relative to taking over certain vessels belonging to any Corporation, citizen, or subject of any nation with which the United Sates may be at war.

1. The following Board is hereby appointed for the purpose of carrying out the provisions of Public Resolution No. 2, 65th Congress (S. J. Res. 42), approved May 12, 1917:

Captain William A. Gill, President;
Captain Emil Theiss, Member;
Naval Constructor William P. Robert, Member;
Paymaster John S. Higgins, Member and Recorder;
Lieutenant Daniel H. Cox, Naval Reserve.

2. The Board is hereby authorized to call for information and assistance in this connection from any and all agencies in any Department of the Government that are in a position to supply the same.

(S.) Woodrow Wilson.

I certify this to be a true copy.

(Sd.) E. L. Lowman, Asst. Paymaster, U. S. N. R. F.

"B"

Navy Department, Washington

N-31/Hn.

October 31, 1917.

Sir: It is requested that Lieutenant-Commander Charles S. Joyce, U. S. N., be appointed as a member of the Board to Appraise Enemy Vessels, to take the place of Captain Emil Theiss, U. S. N. (Deceased).

(S.) Josephus Daniels.

The President, the White House, Washington, D. C.

[fol. 133] The White House,
Washington, D. C.
Nov. 3, 1917.

Approved.
(S.) Woodrow Wilson.

I certify this to be a true copy.
(Sd.) E. L. Lowman, Assistant Paymaster, U. S. N. R. F.

"C"

Navy Department, Washington

N-31/UB.
December 13, 1917.

SIR: The President of the Board to Appraise Enemy Vessels reports that the work of appraising enemy vessels has advanced to such a point that the services of Paymaster John S. Higgins, U. S. N., as a member of that Board can be spared therefrom. His services are urgently required for other duty. It is, therefore, requested that Paymaster Higgins' designation as a Member of the Board to Appraise Enemy Vessels be revoked and he thereby released for assignment elsewhere.
Faithfully yours, (S.) Josephus Daniels.

The President, the White House, Washington, D. C.

The White House
17 December, 1917.

Approved.
(S.) Woodrow Wilson.

I certify this to be a true copy.
(Sd.) E. L. Lowman, Asst. Paymaster, U. S. N. R. F.

"D"

[fol. 134] Navy Department
Board to Appraise Enemy Vessels,
Washington
1st May, 1918.

From: Board to Appraise Enemy Vessels.
To: The Secretary of the Navy.
Subject: S. S. Neckar—Actual value of at the time of taking.

References:

(A) Public Resolution No. 2 (S. J. Res. 42), approved May 12, 1917, (copy appended, marked "A").

(B) Precept of the Board, approved by the President May 19, 1917. (Copy appended, marked "B").

(C) Order making Lieutenant Commander C. S. Joyce a Member of the Board, vice Captain Emil Theiss, deceased, approved by the President November 3, 1917. (Copy appended, marked "C").

(D) Order revoking the appointment of Paymaster J. S. Higgins as a member of the Board, approved by the President December 17, 1917. (Copy appended, marked "D").

(E) Correspondence relative to certain property said to belong to the Ocean Comfort Co., (copies appended, marked "E").

1. The Board appointed by the Secretary of the Navy, under date of May 19, 1917, with the approval of the President, after full and careful consideration of the age and physical condition of the Steamship "Neckar," its equipment and appurtenances at the time of the taking thereof and all other information and facts bearing upon the value thereof, has ascertained and determined the actual value of the said vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, to be Four hundred twenty-four thousand two hundred sixty ($424,260) dollars.

This vessel is composed of the following items:

(A) The vessel, its equipment and appurtenances...	$423,300.00
(B) All other property contained therein, including fuel, consumable supplies, cargo, etc., but not including items in (E) above.....	960.00
Total	$424,260.00

W. A. Gill, Captain, U. S. N., President. W. P. Robert, Naval Constructor, U. S. N., Member. C. S. Joyce, Lieutenant Commander, U. S. N., Member. Daniel H. Cox, Lieutenant, U. S. N. R. F., Member.

Ex. #7—Oct. 11, 1922

[fol. 135] In reply address the Secretary of the Navy and refer to No. —.

Navy Department, Washington

Sept. 1, 1917.

General Order No. 320

Names of Former German Ships

1. The names of the ex-German vessels which have been transferred to the Navy are hereby changed as follows:

Vaterland to Leviathan.
Kronprinzessin Cecilie to Mount Vernon.

Kaiser Wilhelm II to Agamemnon.
Amerika to America.
Hamburg to Powhatan.
Grosser Kurfurst to Æolus.
Kœnig Wilhelm II to Madawaska.
Neckar to Antigone.
Rhein to Susquehanna.
Princess Irene to Pocahontas.
Frederick der Grosse to Huron.
Barbarossa to Mercury.

The vessels George Washington, President Grant and President Lincoln will not be renamed.

2. The names of the tugs Huron, Pocahontas and Powhatan are hereby changed to Allegheny, Chemung and Cayuga, respectively.
(Signed) Josephus Daniels, Secretary of the Navy.

2 October, 1922.

I hereby certify that this is a true copy.
F. S. Curtis, Chief Clerk.

[fol. 136] Ex. #8—Oct. 11, 1922

Cat. No. 1266.
(This form is for use in making duplicate of Certificate of Registry for Bureau of Navigation.)
Insert "permanent" or "temporary": Permanent Register No. 531. Official No. 215458; letters L H Q W.

The United States of America,

Department of Commerce,

Bureau of Navigation

Duplicate Certificate of Registry

S. D. M.
Measured New York, N. Y., 1921; rebuilt at ——; remeasured ——; radio call: K O K N; service: Ocean freight; number of crew: 98.

In pursuance of chapter one, title XLVIII, "Regulation of Commerce and Navigation," Revised Statutes of the United States, Act of May 12, 1917,[1] Frank Walsh, of New York, N. Y., Authorized Agent, having taken and subscribed the oath[2] required by law, and having sworn[3] that[4] United States of America, represented by United States

[1] Insert name and address of person by whom oath or affirmation was made.
[2] Substitute "affirmation" when necessary.
[3] Substitute "affirmed" when necessary.
[4] If there is only one owner, write "he" or "she;" if more than one owner, write "he (or she) owning" and the part owned, "together with" followed by the names of other owners, their shares and addresses.

Shipping Board, is the only owner of the vessel called the "Potomac," of New York, N. Y., whereof William MacLeod is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1900, at Goestemunde, Germany, of[5] steel, as appears by[6] P. R. No. 440, issued at New York, N. Y., March 19, 1921, now surrendered, Name changed from "Antigone" by Authority Commissioner of Navigation, telegram 3850/824, May 2, 1920, and[7] said register having certified that the said vessel is a steamship; that she has three decks, four masts, a plain head, and a- elliptic stern; that her register length is 499.3 feet, her register breadth 58.1 feet, her register depth 28.8 feet, her height — feet; that she measures as follows:

	Tons	100ths
Capacity under tonnage deck[8]	6,508	23
Capacity between decks above tonnage deck	1,980	59
Capacity of inclosures on the upper deck, viz:[9] Forecastle, 183.33; bridge, 681.83; poop, 235.89; break, —; houses—round, 99.97; side, —; chart, 10.65; radio, 6.28; excess hatchways, signals, 2.26; [10]light and air, ——	1,220	21
Gross tonnage	9,709	03
Deductions under Section 4153, Revised Statutes, as amended:		
Crew space, 850.40; Master's cabin, 12.81; Steering gear, —; Anchor gear, 11.88; Boatswain's stores, 75.00; Chart house, 10.65; Donkey engine and boiler, —; Radiohouse, 6.28; Storage of sails, —; Propelling power (actual space[11] 1,755.60), (32%) 3,106.88; Signals, 2.26.		
Total deductions	4,076	16
Net tonnage	5,632	..

I. H. P. 3147.

The following-described spaces, and no others, have been omitted, viz: [12]Forepeak used for water-ballast, —; aftpeak used for water-bal-

[5] Write "wood," "iron," "steel," or as required.

[6] Cite surrendered marine document or write "certificate of——, builder," if first document of a new vessel.

[7] Write "said register," "said enrollment," or "said license." In the first document of a new vessel, give the name and title of the measurer.

[8] Name and give tonnage of each compartment in double bottom and of each peak tank used other than for water ballast which is included herein.

[9] Carry total of all inclosures to spaces at end of next line.

[10] To be included in gross only when authorized by the Commissioner of Navigation.

[11] Insert tonnage representing actual machinery space used in ascertaining propelling power.

[12] To be exempted, cabins and staterooms for passengers must be on a deck which is not a deck to the hull; all other spaces except forepeak, aftpeak, and other water-ballast spaces must be on or above the upper deck to the hull. Give tonnage of each space.

last, —; companionways, 3.18; battery, 6.22; bakery, 19.24; skylight, 11.31; open forecastle, —; open bridge, 8.70; open poop, —; open shelter-deck, —; anchor gear, —; steering gear, 45.91; donkey engine and boiler, 35.57; light and air, 214.69; wheelhouse, 12.48; galley, 89.50; condenser, —; water-closets, 102.61; cabins, 361.40; and the said[18] —— —— having agreed to the description and admeasurement above specified, according to law, said vessel has been duly registered at this Port.

Given under my hand and seal, at the Port of New York, this third day of May, in the year one thousand nine hundred and twenty-one.

John Farrell, Acting Deputy Collector of Customs. T. D. Wilson, Deputy Naval Officer.

Office of Collector of Customs, District of New York, Port of New York

I hereby certify the within to be a true copy of the original on record in this Office.

Given under my hand and seal this second day of October, 1922, for official use. No fee.

John Farrell, Acting Deputy Collector of Customs. (Seal.)

[Endorsed:] Cat. No. 1266. Department of Commerce, Bureau of Navigation. Permanent. Duplicate Certificate of Registry. No. 531 of the steamship called the Potomac of New York, N. Y., 9,709 gross, 5,632 net, issued at the port of New York May 3rd, 1921.

[fol. 137] Ex. #9—Oct. 11, 1922

No. 4678

United States of America,

[Vignette]

Department of State

To all to whom these presents shall come, Greeting:

I certify that the files of this Department contain no application either directly or through the German Government for the return of the steamship Antigone (formerly the Neckar), title and possession to which was taken by the United States under the Joint Resolution of May 12, 1917, nor has this Department any record of a claim for compensation having been filed by the former owners.

In testimony whereof I, Charles E. Hughes, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed

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[18] In the first document of a new vessel, give the name of the person countersigning certificate of measurement.

and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, this fifth day of October, 1922.

Charles E. Hughes, Secretary of State, by Ben G. Davis, Chief Clerk. (Seal of Department of State, United States of America.)

[fol. 138] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF BERNARD M. BARUCH

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Bernard M. Baruch, being first duly sworn, deposes and says:

During the years 1919 and 1920, and particularly during the sessions of the Peace Conference at Paris and Versailles, France, he was Economic Adviser to the American Commission to Negotiate Peace between Germany and the United States of America and the other Allied and Associated Powers, and was a Member of the Economic Drafting Committee, the Reparation Commission, the Economic Commission, and the Supreme Economic Council appointed by the Powers represented at the Conference, and had for-
[fol. 139] merly been Chairman of the United States War Industries Board. He further deposes and says, on information and belief based on his participation in the Peace Conference:

With regard to ships, there was general agreement among the Powers at said Conference that practically all of Germany's merchant marine should be surrendered as part replacement of the losses caused by German submarine activities. The question of the allocation of these ships among the different Allied and Associated Powers proved one of the troublesome problems of the Conference. It is here briefly described as typical of the divergence in national points of view which almost every economic problem presented, and the solution of which was made possible only by mutual concession and appreciation of the position of the others.

The French proposed to allocate to the Allied and Associated Powers in proportion to their respective war losses, and to place in a pool for that purpose, all ships which on August 1, 1914, flew the German flag. This would have resulted in the pooling of all ships condemned by prize court (chiefly British) and ships seized in the Western Hemisphere (chiefly by the United States and Brazil).

The British proposed the pooling of all ships which on the date
[fol. 140] of the coming into force of the treaty were entitled to fly the German flag. This, in British opinion, would have pooled ships seized by the United States, Brazil, Cuba, etc., without prize-

court decisions, and would have left undisturbed the title to ships which had been passed through the prize court.

The American delegates proposed that title to all German ships seized during the war should be confirmed in the captor nation, and that only the remaining German ships be placed in the pool.

Mr. Lloyd George strongly urged that ships, which were at most only useful additions to the economic resources of other nations, constituted the very life blood of the British Empire. He protested the injustice of a principle that, in one case, would permit a nation which had not been an active belligerent to increase its tonnage nearly tenfold while only five per cent of Great Britain's tonnage losses would be replaced.

Mr. Clemenceau urged the claims of France as being in a financial situation which rendered it exceedingly burdensome for her to pay foreign charter hire for her imports. He pointed out that during [fol. 141] the war France had abandoned ship construction so as to devote herself exclusively to other forms of war activities to which her industries were better adapted.

President Wilson declined to accede to any proposition that would involve the surrender by the United States of ships which had been taken over by act of Congress.

A suggested solution was that the United States should retain all vessels seized by her; but this action was not to be extended to other nations of the Western Hemisphere. It was not possible, however, that the United States, despite its far greater contribution to the war, should accept a more favored position than that accorded to her Pan-American associates, who to some extent had entered the war under the inspiration of and as an expression of sympathy towards the United States.

The problem was finally solved by agreeing to place all the belligerents on an equality. The right was recognized to retain seized German tonnage upon the condition that payment be made for reparation account up to the fair value of ships retained in excess of those apportioned to replace war losses. President Wilson stated, however, at the time of accepting this solution, that funds for such [fols. 142 & 143] payments could only be made available by Congressional action and therefore that American fulfillment of this aspect of the agreement would depend upon Congress accepting the view expressed therein.

Bernard M. Baruch.

Subscribed and sworn to before me this 28th day of September, 1922. Edward A. Quinlan, Notary Public. (Seal.)

[fol. 144] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF C. J. STIMMING

C. J. Stimming, being duly sworn on his oath says: I reside at Bremen, Germany, and am Director General of the Norddeutscher Lloyd, which is a corporation organized and existing under the laws of the Free and Hanseatic City of Bremen.

I am well acquainted with the affairs of the Norddeutscher Lloyd and know the ships that it owns and formerly owned. In May 1917 said Norddeutscher Lloyd was the registered and actual owner of the S. S. then called the "Neckar," which steamer had been laid up at [fol. 145] the Port of Baltimore following the outbreak of the European War in 1914. Said steamship Neckar was on May 12, 1917, registered at the Court Register in Bremen, which was her home port, and which Court is the proper place of registry for vessels of Bremen ownership. The Norddeutscher Lloyd has never executed or delivered any bill of sale or other document for the transfer of the title of, or ownership, either absolutely or pro hac vice, of said steamer to any person whomsoever, and has never delivered the possession of said steamer, under charter or otherwise, to any person whomsoever, and particularly has never granted or conveyed to the United States of America title to, or possession of, or the right to use said steamer. In the usual course of business there was reported to me as a director of the Norddeutscher Lloyd the fact that some time in April, 1917, certain persons purporting to represent the United States came aboard the said steamer and took possession thereof and removed the master and crew, and that the master protested to said persons against the seizure of the ship. Said steamer was still registered in the name of the Norddeutscher Lloyd in the said Court Register at Bremen on October 9, 1919. So far as I am aware neither the United States of America nor any other Government has ever put the said steamer through a prize court either for purposes of detention, seizure, condemnation, requisition, or otherwise.

I am temporarily in the United States on the business of my company and have only today been informed of the pendency of [fol. 146] the above entitled action and requested by Mr. Ryan of counsel for the libellants, to make an affidavit setting forth the facts regarding ownership of the said steamship. Neither I nor my company have any interest, pecuniary or otherwise, in this action.

Carl J. Stimming.

Sworn to and subscribed before me this third day of October, 1922. W. B. Manee, Notary Public, New York County, No. 450. New York Co. Register No. 4455. Kings County Clerk's No. 124. Term expires March 30th, 1924. (Seal.)

[fol. 147] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—January 23, 1923

Bigham, Englar & Jones, Kirlin, Woolsey, Campbell, Hickox & Keating, and Carter, Ledyard & Milburn, Proctors for Libellants; D. Roger Englar, T. Catesby Jones, James W. Ryan, John M. Woolsey and John M. R. Lyeth, Advocates.

William Hayward, United States Attorney, Proctor for Respondent; J. Frank Staley, Special Assistant to the Attorney General; Leslie P. Scott and John Hunter, Special Assistants to the United States Attorney, Advocates.

AUGUSTUS N. HAND, District Judge:

This is a consolidated cause in admiralty brought by the owners [fol. 148] of the S. S. "Gaelic Prince," and the owners of cargo thereon, *the* recover damages arising from a collision on October 9th, 1919, between the S. S. "Antigone" and the "Gaelic Prince" in Ambrose Channel.

The case comes before the court upon a suggestion filed by the United States Attorney on behalf of the United States questioning the jurisdiction of the Court. The suggestion sets forth that:

The "Antigone" was formerly the North German Lloyd Liner "Neckar" that had taken refuge in a port of the United States prior to the time when war was declared upon Germany.

By Executive Order made on June 30, 1917, pursuant to Joint Resolution of Congress of May 12, 1917, the President ordered that through the United States Shipping Board there be taken over the title and possession of the "Antigone." The Shipping Board directed Mr. A. V. Lynch to take the vessel into possession, and, on July 17, 1917, he boarded the vessel, and after stating that he took her over, affixed his order of appointment in a conspicuous place thereon.

[fol. 149] On August 29, 1917, the President directed the transfer of the vessel by the Shipping Board to the Navy to be commissioned as a transport.

A Board of Survey, appointed by the Secretary of the Navy to appraise the vessel, filed its appraisal on May 1st, 1918, in the sum of $424,260.

On September 24, 1919, the vessel was transferred by the Navy Department to the Army Transport Service.

On October 9th, 1919, the date of the collision, the "Antigone" was manned by officers and men employed by the War Department, and was engaged in the transportation of supplies and troops of the United States Army between our ports and ports in England and France.

On March 9, 1920, the Suits in Admiralty Act was passed prohibiting the arrest by judicial process in rem of any vessel in the possession of the United States and substituting an action in personam

against the United States. By virtue of that Act this cause was brought.

[fol. 150] The Joint Resolution of May 12, 1917, provided:

"That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, * * * which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, * * * and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings, to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

* * * * * * *

The principal point urged by the libellants in support of their claims is that the Government has no immunity because at the time of the collision it had neither title nor rightful possession. It is contended that neither title nor possession in this case could be law-
[fol. 151] ful unless obtained in the course of prize proceedings. We have, however, an Act of Congress passed under the war power. All decisions made under other conditions must yield to this. The terms "immediate possession and title" evidently cannot have contemplated proceedings in a prize court. International Law will be enforced in our courts but not in the face of a constitutional act of Congress. I can see no reason why the customary suit in admiralty may be supplanted by direct governmental action if Congress clearly so prescribes. Miller v. United States, 11 Wall. 305. Nor was it unlawful to apply to ships much the same sort of procedure as the Trading with the Enemy Act gave to the Alien Property Custodian in respect to property on land.

The Treaty of Peace with Germany by according to the United States the advantages stipulated for the benefit of the United States in the Treaty of Versailles, would seem to confirm all departmental orders regarding the transfer of German property. Proof was adduced at the trial that no claim has been filed with the Department of State for the return of the vessel in question, nor for compensation for her taking.

[fols. 152-165] By reason of the foregoing, the libels cannot stand for the title was in the United States at the time of the collision

and the vessel was engaged in military service. The libels are therefore dismissed with costs.

A. N. H., D., J.

[fols. 166-178] In United States District Court

[Title omitted]

Judgment—February 28, 1923

The above entitled consolidated causes, having come on for trial, upon the pleadings and the proofs adduced by the respective parties, and the Court having rendered a decision that it is without jurisdiction to entertain the causes of action set forth by the libellants above enumberated, which said opinion has been filed herein.

Now on motion of William Hayward, United States Attorney for the Southern District of New York, proctor for respondent, United States of America, it is

Ordered that the above entitled consolidated causes, and each and every one of them, be and the same are hereby dismissed.

Augustus N. Hand, U. S. D. J.

[fol. 179] In United States District Court

[Title omitted]

Judge's Certificate—February 28, 1923

The District Court of the United States for the Southern District of New York hereby certifies to the Supreme Court of the United States that the above entitled consolidated causes came on to be heard upon the amended libels, the suggestions or special pleas of the respondent and motions to dismiss the libels therefor, and the proofs of the libellants in support of the allegations of jurisdictional facts in the amended libels, and of the respondent in support of the allegations of non-jurisdictional facts in the said suggestions or special pleas of the respondent.

The amended libels are filed in personam against the United States of America under the provisions of the suits in Admiralty Act of March 9th, 1920, and seek to enforce a liability of the Steamship [fol. 180] "Antigone" for collision damages which she is alleged to have incurred on October 9th, 1919, as a privately-owned vessel before she came into the lawful possession or ownership of the United States. The amended libels allege that after the collision and before the commencement of suit the United States came into lawful possession of the "Antigone," thus preventing the libellants from suing her in rem except as provided in the Act of March 9th, 1920 aforesaid. The respondent denies the jurisdiction of this

Court in these consolidated causes by setting up in its suggestions, as new facts in the nature of a plea in bar, that on July 17th, 1917, the President of the United States seized the "Antigone" and therefore that, under the provisions of the joint resolution of Congress of May 12th, 1917, the "Antigone" at the time of the collision was owned by and in the lawful possession of the United States and was a public vessel of the United States immune from the jurisdiction of this Court. The respondent also contends that even assuming that the executive seizure, without the usual deposit of value or Court proceedings, was insufficient to transfer the right of use, in addition to the right of detention or immediate possession, the Treaty of Peace of July, 1921, between Germany and the United States confirmed or cured the defective transfer.

The libellants deny that the seizure of the "Antigone" without being supplemented by a proper deposit of her value, or by prize or [fol. 181] other Court proceedings, transferred to the United States the right to use the vessel for Governmental or other purposes. They content that the possession of the "Antigone" at the time of the collision was vested not in the United States of America but in a prize court through the seizing officers as its servants or custodians under the principle that Government officers seizing the vessel as prize take custody not as Government officers but as servants of the prize court, and that her use by the United States after the seizure without requisition order or condemnation by the prize court being in violation of both Municipal and International law was insufficient to divest the prize court of its possession actual or constructive, or to convert the "Antigone" into a sovereign vessel entitled to immunity from the ordinary liabilities of merchant vessels. The libellants further contend that the joint resolution of May 12th, 1917 contemplated that possession and title to the vessels would be taken over by the President by the usual method authorized by International and Municipal Law, namely by deposit of her value or commencement, as soon as practicable after the seizure, of prize court proceedings. The libellants contend further that if the Joint Resolution of May 12th, 1917 contemplated a transfer of the right to use, or the title, in addition to mere temporary or immediate possession or custody, without deposit of value or prize court proceedings, the resolution was both unconstitutional and in direct violation of International Law and therefore to that extent invalid. This invalidity or defect was not, the libellants contend, cured by the Treaty of Peace of July, 1921, be- [fol. 182] cause that Treaty did not operate retroactively so as to annul the rights of innocent third persons, such as the libellants, which were vested on October 9th, 1919, at the time of the collision, and in February, 1921, at the time these suits were commenced.

Now, therefore, it is certified that the issues upon which these causes were decided were the following:

1. Whether or not this Court had jurisdiction of this cause.

2. Whether or not Congress by the joint resolution of May 12th, 1917 intended that the President after taking over the immediate possession of the vessels by seizure should take over the right to use

and the title by deposit of the seized vessel's value or by prize court proceedings as required by International Law.

3. Whether or not the joint resolution of Congress of May 12th. 1917 as interpreted by the respondents, although in violation of International Law, should be regarded as valid and binding on this Court.

4. Whether or not the joint resolution of Congress of May 12th, 1917, as interpreted by the respondent, was constitutional.

5. Whether or not the Treaty of Peace of July, 1921, between Germany and the United States by confirming all departmental orders cured the defective seizure so as *the* deprive libellants of any lien or remedy they had in February, 1921, at the time these suits were commenced.

6. Whether or not the interest of the United States in the Steam-[fol. 183] ship "Antigone" at the time of the collision involved herein was sufficient to make her a sovereign vessel entitled to immunity from the ordinary liabilities of private vessels.

I found:

1. That this Court was without jurisdiction.

2. That Congress by the Joint Resolution of May 12, 1917, did not contemplate a deposit of the vessel's value, or proceedings in a prize court.

3. That, as so interpreted, the resolution, although in violation of International Law, should be regarded by this Court as a valid exercise by Congress of its war power.

4. That, as so interpreted, the resolution was constitutional.

5. That the Treaty of Peace of July, 1921, between Germany and the United States confirmed retroactively the executive orders in the years 1917 and 1918 with reference to the Steamship "Antigone" so as to deprive the libellants of any lien or remedy they had in February, 1921, at the time these suits were commenced.

I, therefore dismissed the libels.

I further certify that these are the only questions of law upon the pleadings and process for the decision of the Supreme Court of the United States, and that this Certificate was granted at the term [fol. 184] in which the decree in this case was entered.

Augustus N. Hand, United States District Judge.

[fol. 185] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF CERTIFICATE

SIRS: You will please take notice that the foregoing is a copy of a certificate to the United States Supreme Court which will be presented to the Honorable Augustus N. Hand for settlement in the office of the Clerk of the United States District Court, in the United States Court House and Post Office Building, Borough of Manhattan, City of New York, on the 28th day of February, 1923, at 10:30 A. M.

Bigham, Englar & Jones, 64 Wall Street; Kirlin, Woolsey, Campbell, Hickox & Keating, 27 William Street; Carter, Ledyard & Milburn, 54 Wall Street, New York City, Proctors for Libellants.

To William Hayward, Esq., United States Attorney for the Southern District of New York, Room 700, 45 Broadway, New York City, Proctor for Respondent; Alexander Gilchrist, Esq., Clerk, U. S. District Court, Southern District of New York, Post Office Building, New York City.

[fols. 186 & 187] CITATION—In usual form; omitted in printing

[fols. 188-191] BOND OF APPEAL FOR $250—Approved and filed May 26, 1923; omitted in printing

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[fol. 192] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed May 26, 1923

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The above named libellants hereby appeal to the Supreme Court of the United States from the decree entered in these consolidated causes on the 28th day of February, 1923, for the reasons specified in the assignment of errors which is filed herewith, and pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States.

[fol. 193] And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made.

Bigham, Englar & Jones, Carter, Ledyard & Milburn, Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Libellants.

The above petition is granted and the appeal allowed upon giving bond conditioned as required by law in the sum of $250 Dollars.

Augustus N. Hand, United States District Judge.

[fol. 194] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 26, 1923

The libellants hereby assign errors in the rulings and proceedings of the District Court herein as follows:

1. The Court erred in holding that respondent was in lawful possession of the Steamship "Antigone" at the time of the collision involved herein.

2. The Court erred in holding that at the time of the collision the Steamship "Antigone" was a public vessel of the United States entitled to immunity from the ordinary collision liabilities of private vessels.

3. The Court erred in holding that the President took over the immediate possession and title to the Steamship "Antigone" as directed by the Joint Resolution of Congress of May 12, 1917.

[fol. 195] 4. The Court erred in holding that the United States of America at the time of the collision had not under international and municipal law forfeited any right of possession by failing within a reasonable time after the seizure to institute proceedings in a Prize Court for the condemnation of the vessel or deposit her value with a Prize Court or an assistant treasurer of the United States.

5. The Court erred, after holding that the President took over immediate possession and title to the steamship "Antigone" as directed by the Joint Resolution of May 12, 1917, in further holding that said Resolution as so interpreted was constitutional.

6. The Court erred in holding that the President was authorized by the Joint Resolution of May 12, 1917, to take over the immediate possession and title to the steamship "Antigone" otherwise than in accordance with the method and usage sanctioned by international law.

7. The Court erred in holding that a seizure of a private unarmed enemy merchant vessel innocently in a port of the United States at the outbreak of hostilities conferred a right of possession of the vessel on the United States of America in the absence of evidence that such seizure was followed within a reasonable time by a deposit of her value or proceedings in a Prize Court for her condemnation.

[fol. 196] 8. The Court erred in holding that the Treaty of Peace of 1921 between Germany and the United States operated retroac-

tively so as to injure innocent third persons, the libellants in the present cause by conferring on the United States lawful possession of the steamship "Antigone" as of October 9, 1919, the date of the collision involved herein.

9. The Court erred in holding that A. M. Vanardi was ever a Commissioner of the United States Shipping Board and/or an Agent of the President of the United States authorized directly or through his servant, A. V. Lynch, to take over the immediate possession and/or title to the steamship "Antigone."

10. The Court erred in failing to dismiss the suggestion of want of jurisdiction filed by the United States of America.

11. The Court erred in entering a decree dismissing the libel.

12. The Court erred in holding that mere sovereign use without right of lawful possession or ownership is sufficient to confer on a private merchant vessel the immunity of public vessels from the ordinary collision liabilities of private merchant vessels.

13. The Court erred in failing to enter a decree for the libelants on the grounds stated in the jurisdictional certificate signed by said [fol. 197] Court on March 1, 1923, and directed to the Supreme Court of the United States.

Bigham, Englar & Jones, Carter, Ledyard & Milburn, Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for the Libellants.

[fol. 198] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR SETTLEMENT OF TRANSCRIPT OF RECORD

SIRS: You are hereby notified that a motion will be made at 10:30 o'clock a. m. on Tuesday morning, June 3rd, 1924, at the chambers of Hon. Augustus N. Hand, on the 12th floor of the Woolworth Building, New York City, for an order directing the Clerk to settle and certify the documents and papers, copies of which are attached hereto, as the Transcript of Record on appeal to the Supreme Court of the United States.

Dated New York City, May 29, 1924.

Yours, etc., Bigham, Englar & Jones, Kirlin, Woolsey, Campbell, Hickox & Keating, Carter, Ledyard & Milburn, Proctors for Libellant.

To the Solicitor General of the United States, Washington, D. C.; [fol. 199] William Hayward, Esq., United States Attorney for the Southern District of New York.

[fol. 199½] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR TRANSCRIPT OF RECORD—June 6, 1924

On motion of Messrs. Bigham, Englar & Jones, Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating and Messrs. Carter, Ledyard & Milburn, proctors for libellants; and after hearing J. Frank Staley, Special Assistant in Admiralty to the Attorney General of the United States, and John Hunter, Esq., on behalf of the respondent; and it appearing that the papers attached hereto constitute a true and complete transcript of the pleadings, testimony, exhibits and other proofs introduced at the trial of this cause; and it appearing that the papers attached hereto correspond with the minutes and notes taken by the court at the trial; and good cause appearing therefor, it is hereby

Ordered that the attached papers be certified to the Supreme Court of the United States as being a true, full and correct copy of the pro-
[fol. 200] ceedings had and orders entered as therein stated in consolidated cause No. 77—57 wherein L. Littlejohn & Co., Inc., et als., were libellants and the United States of America was respondent as the same appears on record and on file in the office of the Clerk of this court, all of which constitute the entire transcript of the proceedings in the cause; and it is further

Ordered that the Clerk of this court execute and file a certificate in accordance herewith.

Augustus N. Hand, United States District Judge.

[fols. 201 & 202] ORDER FOR TRANSCRIPT OF RECORD—Omitted; printed side page 199 ante

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[fol. 203] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a correct transcript of the record of the said District Court in the above entitled case as settled by the Court.

J. Frank Staley, Special Assistant to the Attorney General.
Bigham, Englar & Jones, Kirlin, Woolsey, Campbell, Hickox & Keating, Carter, Ledyard & Milburn, Proctors for Libellants.

[fol. 204] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as settled by the court.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 13th day of June in the year of our Lord one thousand nine hundred and twenty-four and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk. (Seal of District Court of the United States, Southern District of N. Y.)

Endorsed on cover: File No. 30,411. S. New York D. C. U. S. Term No. 446. L. Littlejohn & Co., Inc., General Silk Importing Company, Henry W. Peabody & Co., et al., appellants, vs. The United States of America. Filed June 14th, 1924. File No. 30,411.

(5108)

FILED
OCT 23 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1925—No. 94.

L. LITTLEJOHN & COMPANY, INC., *et als.*,
Appellants,

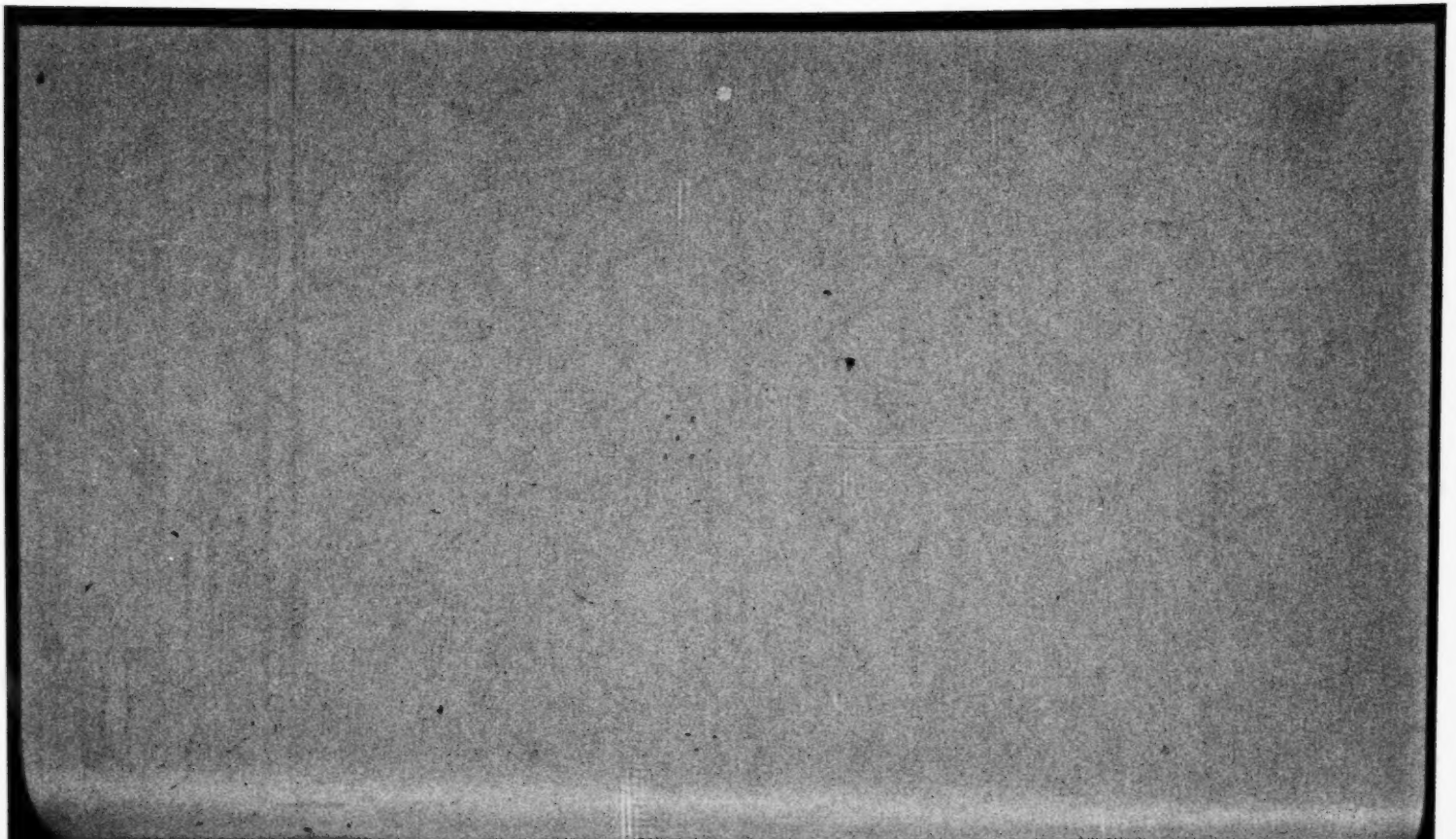
—against—

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF APPELLANTS.

JAMES W. RYAN,
JOHN M. WOOLSEY,
Counsel for Appellants.

T. CATESBY JONES,
D. ROGER ENGLAR,
J. M. R. LYETH,
KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
CARTER, LEDYARD & MILBURN,
BIGHAM, ENGLAR & JONES,
Of Counsel.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925—No. 94.

L. LITTLEJOHN & COMPANY, INC., *et als.*,
Appellants,

—against—

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF APPELLANTS.

Proceedings Below.

Opinions of District Court:

Unreported opinion of Circuit Judge Charles M. Hough (R. 22).

Order of Judge Hough accompanying opinion (R. 23).

Opinion of District Judge A. N. Hand (R. 56). 1923 American Maritime Cases 219.

Final decree (R. 58).

Jurisdictional certificate of District Court (R. 58).

Jurisdiction:

This is an appeal taken May 26, 1923 (R. 61), under Section 238 of the Judicial Code (as it existed before the Act of February 13, 1925), from a final decree of

the United States District Court for the Southern District of New York entered February 28, 1923 (R. 58).

The decree sustained a claim or suggestion of the United States Attorney at New York, and dismissed collision libels in admiralty for want of jurisdiction (R. 58).

The libellants, the appellants here, had contended in part that the Court should dismiss the claim of the United States Attorney on the ground that it had not been properly presented. They also contended that the Court had jurisdiction to hear it only provided the United States would consent to the libellants' motion to transfer the claim to the prize side of the Court.

The District Court on February 28, 1923, after reciting the proceedings and claims of the respective parties, certified the following questions to this Court (R. 58):

> "Now, therefore, it is certified that the issues upon which these causes were decided were the following:
>
> 1. Whether or not this Court had jurisdiction of this cause.
>
> 2. Whether or not Congress by the joint resolution of May 12th, 1917, intended that the President after taking over the immediate possession of the vessels by seizure should take over the right to use and the title by deposit of the seized vessel's value or by prize court proceedings as required by International Law.
>
> 3. Whether or not the joint resolution of Congress of May 12th, 1917, as interpreted by the respondent, although in violation of International

Law, should be regarded as valid and binding on this Court.

4. Whether or not the joint resolution of Congress of May 12th, 1917, as interpreted by the respondent, was constitutional.

5. Whether or not the Treaty of Peace of July, 1921, between Germany and the United States by confirming all departmental orders cured the defective seizure so as to deprive libellants of any lien or remedy they had in February, 1921, at the time these suits were commenced.

6. Whether or not the interest of the United States in the Steamship *Antigone* at the time of the collision involved herein was sufficient to make her a sovereign vessel entitled to immunity from the ordinary liabilities of private vessels.

I found:

1. That this Court was without jurisdiction.

2. That Congress by the Joint Resolution of May 12, 1917, did not contemplate a deposit of the vessel's value, or proceedings in a prize court.

3. That, as so interpreted, the resolution, although in violation of International Law, should be regarded by this Court as a valid exercise by Congress of its war power.

4. That, as so interpreted, the resolution was constitutional.

5. That the Treaty of Peace of July, 1921, between Germany and the United States confirmed retroactively the executive orders in the years 1917 and 1918 with reference to the Steamship

Antigone so as to deprive the libellants of any lien or remedy they had in February, 1921, at the time these suits were commenced.

I, therefore, dismissed the libels.

I further certify that these are the only questions of law upon the pleadings and process for the decision of the Supreme Court of the United States, and that this Certificate was granted at the term in which the decree in this case was entered."

The foregoing findings of Judge Hand are the errors of which complaint is made by the appellants.

The record on appeal was filed on June 14, 1924. The appeal was therefore pending in this Court when the Act of February 13, 1925, became effective.

By Section 14 of that Act appellants' right was preserved to invoke the jurisdiction of this Court.

A great many decisions of this Court might be cited in support of its jurisdiction in this case.

It has jurisdiction:

1. Because of the certificate by the District Court of the question of jurisdiction.

The Pesaro, 255 U. S. 216, 218;
The Paquete Habana, 175 U. S. 677;
Kirby v. *American Co.*, 194 U. S. 141;
Bowker v. *United States*, 186 U. S. 135;
Powers v. *Chesapeake R. Co.*, 169 U. S. 92, 96.

2. Because of the Constitutional questions involved.

Raton Co. v. *Raton*, 249 U. S. 552;
City of New York v. *Consolidated Gas Co.*, 253 U. S. 219;
Arkansas v. *Schlierholz*, 179 U. S. 598.

And

3. Because of the question involving the construction of the Treaty with Germany.

Mitchell v. *Furman*, 180 U. S. 402.

Statement of the Case.

Libels:

This is a consolidated collision suit in admiralty. The collision occurred in New York Harbor on October 9, 1919, between the steamships *Antigone* and *Gaelic Prince*.

The amended libels allege that after the collision the United States, by the Peace Treaty with Germany, acquired the right of possession of the *Antigone*, subject to the collision lien. The libels are therefore brought in accordance with the Suits in Admiralty Act of March 9th, 1920, against the United States *in personam*, as a substitute for libels *in rem* against the *Antigone*, to enforce the maritime lien which was created against her by the collision.

Claim:

The United States Attorney at New York filed a claim or suggestion that the United States acquired possession and title to the *Antigone* before the Peace Treaty and before the collision, and therefore that when the collision occurred she was a public vessel immune from liability to the collision lien.

The claim was based on the alleged fact that the

President had acquired possession and title by capture or seizure of the *Antigone* as an enemy merchant vessel in a United States port in accordance with a joint resolution of Congress of May 12, 1917.

Exceptions to Claim:

The libellants, the appellants here, excepted to the jurisdiction of the Court on its admiralty side to entertain the claim. These exceptions were based on the points of law and fact which form the body of the present brief.

Answer to Claim:

The libellants also filed an answer (R. 20) denying the allegations in the claim.

Hearing of Claim by Circuit Judge Hough:

The claim and its answer were brought on for hearing on motion of the United States on September 28, 1922, before Circuit Judge Charles M. Hough (R. 22).

Two Assistant United States Attorneys appeared in support of the claim.

They admitted that they were unable to produce the usual commission or certificate of the *Antigone* as a public vessel at the time of the collision. Nor did they produce the commanding officer or master of the *Antigone*. Nor did they present any statement from the master or any proof that he had a commission from the President or the Secretary of War.

Nor did they present any claim by the master of the *Antigone*, the President of the United States or the Secretary of War or Navy or any other proper officer

that the *Antigone* was immune from liability to collision liens because she was a public vessel.

The appellants objected, therefore, at the outset of the hearing that an admiralty court in a collision suit could not accept as proof of possession and privileged public status a claim of Assistant Attorneys based on acts of force, especially as these acts of force had not yet been approved on the prize side of the courts by an order of requisition or detention, and raised questions of international law and interpretation of treaties.

These circumstances made the United States Attorneys' claim really a proceeding to quiet or establish right of possession rather than a claim cognizable in an admiralty court.

It was further objected that if such a claim was cognizable in this collision suit it was so independent of the libels as to constitute a submission to the jurisdiction of the Court, enabling it on equitable principles to recognize the collision lien.

The appellants were willing, however, that the District Court entertain the claim, provided they were given the same right that they would have on the prize side. The usual practice is to have an order entered on the prize side detaining or requisitioning the vessel, or to deposit her appraised value. If the Government had followed this practice its claim would have been regarded as a submission to jurisdiction, and the appellants' collision lien would have been enforced as a condition to entry of an order or decree for the Government.

Without ruling finally on the objections, Judge Hough notified the United States Attorney that he would receive in evidence all the testimony, documents and proofs

of every kind that he wished to introduce in support of the claim. The United States Attorney then introduced the following documents which are recited in Judge Hough's order (R. 24):

> "(1) a certified copy of an order transferring the *Antigone* to Army Transport Service, dated September 24, 1919;
>
> (2) a certified copy of joint resolution adopted by Congress and approved by the President May 12, 1917;
>
> (3) an executive order issued August 29, 1917;
>
> (4) affidavit of Frank H. Phipps, Jr., Major C. A. C., verified 26th September, 1922."

The Government then rested:

The libellants filed in opposition an affidavit of Bernard M. Baruch, verified September 27, 1922.

Judge Hough's Opinion:

Judge Hough then took the claim under submission and on September 29, 1922, filed an opinion (R. 22) and an order (R. 23) holding that the Government's claim had not been sufficiently proved.

> "But I am not authorized to take judicial cognizance of this matter, and I am persuaded that the documents and affidavits submitted on the suggestion-hearing, do not and cannot tell the whole story. I should want to know what the United States had done to the vessel, whether it had been re-built and re-conditioned, how it was manned and especially what, if any, steps had been

> taken by the original private German owner to maintain or re-assert any claim of ownership in the original *Neckar*. In short, I do not think that a sufficient ground-work is laid for the argument made at bar" (Judge Hough's opinion, R. 23).

He also held that the Government's claim as presented was "bad practice" and was really an independent proceeding which should be tried separately on the regular trial calendar, and:

> "That upon the trial of said issue the burden of evidence shall in the first instance be upon the United States, which shall be obliged to produce evidence showing the facts, if any, which resulted in the alleged ownership, title and control of said United States in and of said *Antigone*" (Judge Hough's order, R. 24).

Judge Hough then ordered that the claim proceeding be tried at the head of the next admiralty trial calendar (R. 24). The United States Attorney did not appeal from Judge Hough's order and has not assigned it as error in this Court.

Trial Before Judge A. N. Hand:

The claim proceeding came on for trial a second time on the regular admiralty trial calendar before District Judge A. N. Hand and was tried on October 10th (R. 25-26), October 11th (R. 27), and October 17th (R. 35), 1922.

Only the same two Assistant United States Attorneys appeared in support of the claim. Notwithstanding Judge Hough's opinion and order, they offered in sup-

port of the claim substantially nothing more than the affidavits and documents which Judge Hough had held insufficient and which are designated in Judge Hough's order (R. 24).

The only further proof offered by the Government at this three-day trial before Judge Hand consisted of the testimony of two witnesses, Anthony Lynch and Benjamin Pender, and the following documents:

1. Exhibit 1 (R. 43), a letter dated July 14, 1917, from one of the commissioners of the United States Shipping Board to Lynch, a civilian at New York.

2. Exhibit 6 (R. 46-49), reports showing the appraisal of the *Antigone* (ex *Neckar*) on May 1, 1918, by a board of survey in the sum of $424,260.

3. Exhibit 7 (R. 49), copy of an order changing the name of the *Neckar* to *Antigone*.

4. Exhibit 8 (R. 50), a certificate of registry of the *Antigone* as a merchant vessel of the United States issued on May 3, 1921, superseding provisional certificate of registry No. 440, issued at New York on March 19, 1921 (R. 51), which provisional register was based not on any previous United States commission or certificate of the vessel, but on the "Act of May 12, 1917" (R. 50); and

5. Exhibit 9 (R. 52), a certificate dated October 5, 1922, of the Chief Clerk of the Department of State that the files of his Department contained no application "either directly or through the German Government for the return of the steamship

> *Antigone* * * * nor has this Department any record of a claim for compensation having been filed by the former owners."

The witness Lynch, called by the Government, testified that he went on board the *Antigone* in the Navy Yard at Norfolk in July, 1917, while some unknown workmen in dungarees, or working clothes, were on board, and tacked on her a copy of a letter to him from one of the commissioners of the Shipping Board reciting that he was "to take possession of her in the name of the United States Shipping Board for and on behalf of the United States of America" (R. 43). Lynch further testified that he left the vessel within half an hour after going on board and never returned or appointed a successor.

The other witness, Pender, was called by the Government for some strange and irrelevant reason to testify that in May, 1920 (R. 23), several months after the collision, he made repairs to the *Antigone* in reconditioning and fitting her out for service as a passenger ship (R. 32).

The Government then rested.

No evidence was offered to show that the *Antigone* at the time of the collision had the usual commission or certificate of a vessel of the United States. All that was attempted to be shown was that on September 24, 1919, Colonel Phipps at New York had "placed a master, officers and crew on board the *Antigone*, who were at that time sworn in in the U. S. Army Transport Service" (R. 46); but it was not shown who these persons were or what their story was as to the character of the vessel, or the service she was fitted for or was performing.

Indeed, the Assistant United States Attorney conceded that "The Government does not question the fact that the master of the *Antigone* would again testify that the *Antigone* was in charge of Pilot Wood" (R. 36).

Pilot Wood was a civilian employe of a New York Pilot Association (R. 25).

Judicial notice can be taken of the fact of common knowledge that public vessels not only do not employ these civilian pilots, but are never in charge of any civilian not holding a commission from the President as an officer of the United States. This admission of the master of the *Antigone* and of the United States Attorney that a civilian employe of a private pilot association was in charge of the *Antigone* at the time of the collision, apparently under an independent contract of some sort, would seem to show clearly the civilian and non-public status of the vessel.

Nor was it shown that the United States had assumed any obligation to make compensation to her private German owners for damages suffered by her or for collision liens incurred by her during her war service. In other words, there was no proof that the Government had assumed the marine operating risks.

The proof showed that the *Antigone,* at the time of the collision, was merely an empty vessel without cargo (excepting a few boxes of household effects) or passengers, without a commission or certificate, excepting her German certificate, and without any person on board holding a commission from the President as an officer of the United States.

She was merely a temporary floating platform designed for private German purposes which might be of some use to the United States Army if she arrived at

France and was re-conditioned, but which the United States had not seen fit on October 9, 1919, to commission or certificate as a vessel of the United States, either public or private.

No evidence was introduced to show that the office at New York had anything to do with booking passengers or troops for her proposed voyage from France to New York, and there was no evidence regarding the time at which it was intended that that voyage should begin.

It was not even shown that the *Antigone* was not at the time of the collision flying the German flag, which she was entitled to fly under her uncancelled German merchant vessel register (Stimming, R. 55).

The libellants then moved to dismiss the Government's proceeding on the grounds set forth on page 35 of the Record. This motion was denied and an exception noted (R. 35).

The libellants then offered in evidence (R. 55), by consent (the United States specifically waiving the right of cross examination—R. 25), the affidavit of Carl J. Stimming, the Director General at Bremen of the Nord Deutscher Lloyd. This affidavit stated that at the time of the collision the *Antigone* was still registered at the Court Registry in Bremen, her home port, as the property of the Nord Deutscher Lloyd, and that no transfer had ever been made to the United States of possession of or title to that vessel, and that:

> "Neither the United States of America nor any other Government has ever put the said steamer through a prize court, either for purposes of detention, seizure, condemnation, requisition, or otherwise" (R. 55).

Director General Stimming further testified that "in April, 1917, certain persons purporting to represent the United States came aboard the said steamer and took possession thereof and removed the master and crew, and that the master protested to said persons against the seizure of the ship" (R. 55). He further testified that the *Antigone* "had been laid up at the port of Baltimore following the outbreak of the European War in 1914" (R. 55).

The libellants also offered without objection by the Government an affidavit of Bernard M. Baruch (R. 53), confirming the statements made in his recently published treatise. Mr. Baruch testified that he was the Economic Advisor to the American Commission to Negotiate Peace between Germany and the United States, and that, at the Peace Conference, in the years 1919 and 1920, the British and French delegates protested the claim of the United States to possession of the German merchant ships, including the *Antigone,* which had been seized while lying in United States ports. This protest was based on the ground that the ships "were entitled to fly the German flag" (R. 53), and that the claim of the United States was unfounded, because the seizure of the vessels had not been followed by "prize court decisions" (R. 53-54). He further testified that President Wilson finally agreed, subject to confirmation by Congress, to pay "for reparation account up to the fair value" of the German ships seized in United States ports provided the protests would be withdrawn.

The libellants then called as a witness John Foster Dulles, of the firm of Messrs. Sullivan & Cromwell. Mr. Dulles, during the Peace Conference, was the Financial

Advisor to the American Commission to Negotiate Peace appointed by the President of the United States (R. 36). Mr. Dulles was asked whether the President of the United States had not, in his presence and before the Assembly at the Peace Conference, formally admitted and acknowledged:

> "that neither he nor the United States had ever taken over lawful possession of or title to the German merchant vessels, including the *Neckar*, later known as the *Antigone*, which were interned in United States ports at the outbreak of war between the United States and Germany" (R. 39).

This evidence was offered as an admission by the United States (R. 38), and also:

> "to contradict the Government's evidence by showing the untruth of the allegation by the Government in its suggestion of want of jurisdiction that the President of the United States took over either the immediate possession or the title to the *Antigone* in July, 1917" (R. 38-39).

The question was objected to "as being a matter of State privilege" (R. 36).

The objection was erroneously sustained.

Further questions on the same line designed to show the execution of an agreement or treaty between President Wilson on behalf of the United States and the other representatives at the Peace Conference with respect to the *Antigone* and other seized ships were also objected to and excluded on the same ground of State privilege (R. 36-42).

The libellants and the United States Attorney then rested and after oral argument and briefs, Judge Hand took the case under submission.

On January 23, 1923, Judge Hand filed an opinion (R. 56, 1923 A. M. C. 219), sustaining the claim and dismissing the libels for want of jurisdiction.

On February 28, 1923, he entered a final decree (R. 58), and certified (R. 58-60) the questions involved to this Court.

FIRST POINT.

The relation of the United States to the seized ships, including the *Antigone*, was the same as the relation of the Alien Property Custodian under the Act of October 6, 1917, to the other enemy-owned private property afterwards seized by him.

The resolution under which these ships were seized was drafted and passed hurriedly in May, 1917. Several months later, in October, 1917, after careful consideration and drafting, the first Trading with the Enemy Act was passed, creating the office of Alien Property Custodian, and authorizing the seizure of all enemy-owned private property.

If the ships had not already been seized they would certainly then have been seized by the Alien Property Custodian.

The debates in Congress with reference to the resolution of May, 1917, correspond almost exactly with the debates with reference to the act afterwards passed in October, 1917.

These debates show that Congress intended to treat all enemy-owned private property alike.

The property, including the ships, was merely to be seized and continued in normal operation during the war, the United States assuming none of the operating risks nor receiving as its own any of the operating profits. The use of the term United States with reference to the operation of the seized ships has exactly the same significance as the term Alien Property Custodian under the Act of October 6, 1917, with reference to the other seized enemy property. The United States was merely a receiver, sequestrator, custodian, or licensee of the ships and other seized enemy property.

Undoubtedly, if the Alien Property Custodian had been in existence, when owing to the exigencies arising at the beginning of the war, the interned German vessels were taken into the custody of the United States, the procedure which would have been followed regarding these vessels would have been that after taking them into his custody, the Alien Property Custodian would have given the United States a free license to use them during the war, as was done with most of the German-owned patents. If this approach is taken to the situation involved in this case many obscurities in the legal relationships involved are clarified.

The *Antigone* normally operated in regular liner service between Europe and New York as a passenger and cargo carrier. The war stopped this operation temporarily. The United States in May, 1917, merely decided to continue the normal operation of the *Antigone* as a going concern. This was done by the Alien Property Custodian with reference to numerous other enterprises temporarily stopped by the war.

The only real differences between the actual operation of the *Antigone* between New York and Europe by the

United States during the war and the operation by her owner in peace time were that during the war the payment to her owner of charter hire, freight and passage money was suspended. On the other hand he was saved the immediate disbursement of operating expenses.

In *Central Trust Company* v. *Garvan*, 254 U. S. 554, 569, Mr. Justice Holmes, delivering the opinion of this Court with reference to the Amendment of March 28, 1918, which broadened the powers granted to the Custodian under the Act of October 6, 1917, said:

> "To the conclusion that we reach it is objected that the Custodian gets a good deal more than bare possession—that the property is to be conveyed to him, and that by the Act of March 28, 1918, c. 28, 40 Stat. 459, 460, enlarging Section 12, the Custodian 'shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be required to be conveyed,' etc., to him and is given the power to sell and manage the same as though he were absolute owner. All this may be conceded if no claim is filed. But this Act did not repeal Section 9, * * *."

(Section 9 is the provision of the Act which authorized those whose property had been improperly seized to sue for it.) And then he continues:

> "* * * And as we have said, provides for immediate claim and suit and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result. The present

> proceeding gives nothing but *the preliminary custody, such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned, and does no more*" (pp. 22, 23; Italics ours).

In the majority opinion of the United States Circuit Court of Appeals for the Third Circuit in *United States* v. *Chemical Foundation, Inc.*, 5 Fed. (2d) 191, speaking of the amendment by the Act of Congress of March 28, 1918, to the Trading with the Enemy Act of October 6, 1917, it is said (at page 205):

> "It is evident that by this amendment Congress transformed the Trading with the Enemy Act from a purely conservation measure to one of action, definite and drastic. It no longer left the ultimate disposition of seized enemy property in suspense, but determined its disposition with finality. While it gave the Custodian the same custodial powers which it had previously vested in him, Congress gave him additional powers over seized enemy property to meet a war situation which had arisen since the date of the original enactment and to meet other war situations as they should arise in the future * * *."

The uniquely American and inequitable theory on which the immunity from judicial process of property actually being used for public purposes is based, is that incidental injury to private persons resulting from the normal exercise of a sovereign function should not be compensated for by the sovereign unless the injury constitutes a "taking" of property, or unless the legislative branch of the sovereign especially consents. But admit-

ting, for purposes of argument, all the facts suggested by the United States Attorney, the present case is not within that theory.

We are not asking the sovereign (excepting as a subsequent taker of property subject to our lien) to compensate us for the damage to our ship or cargo. Nor are we asking such compensation indirectly by asking for a seizure or sale of any property belonging to the sovereign at the time of the collision, or of any property which it had promised to keep free from liens or damage.

Immediately after the collision, the United States could have returned the *Antigone* to her German owner without compensating the owner for the physical damage suffered by her in the collision, and without first paying off our collision liens. The United States had never promised to return the *Antigone* to her German owner at the end of the war free from liens and free from physical injuries suffered from the negligence of servants employed by the United States to navigate the vessel. As custodian or receiver, the United States was not personally liable for such injuries or liens, but they created charges against the *Antigone* as the trust fund or asset of the receivership.

In *The Western Maid* cases, 257 U. S. 419, the United States owned absolutely one of the vessels, and by requisition charter parties had formally promised to return the other two vessels there involved at the end of the war, free from all liens and free from physical injuries suffered during the charter service.

In those cases the suits against the vessels were suits against the United States, because the United States would have to pay any decree.

In the present case, the United States (excepting as a subsequent taker of property subject to lien) will not have to pay any decree that may be entered. Here the decree would normally have been paid after public use of the vessel ended by her seizure and sale by an admiralty court. In substance, this would mean merely that the United States was at the end of the war returning the *Antigone* to her German owner, less the physical injuries and liens suffered by her during war service. The maritime lien for the damages to the *Gaelic Prince* follows and is regarded the same as the physical injuries suffered by the *Antigone* herself. This, of course, assumes that the servants navigating the *Antigone* are on the trial held negligent.

It is equitable that this should be so. Why should the damages incidental to the war service of the *Antigone* fall on innocent American and British cargo and shipowners, rather than on the private German owner and his vessel whose negligence caused the damages. The German sovereign, whose national owned the *Antigone* was causing the necessity for the war service of the *Antigone*, and she was used in resisting and minimizing the damages caused by Germany in plying between Europe and New York as she was normally operated before the war.

The maritime collision rules are the result of centuries of experience and are observed by vessels of all nations. The lien liability resulting from a violation of those rules is founded on the most equitable reasons and is designed to encourage careful navigation and to prevent the loss of life and property on other vessels. It is a serious thing for a court to exempt a vessel from the normal application of the maritime collision law and thus en-

courage carelessness and endanger lives and other vessels. Such exemption should be granted only to vessels in charge of officers commissioned by and responsible directly to the President (or at least to the Secretary of War or the Secretary of the Navy). Immunity should be denied to vessels whose injury or loss would not ultimately fall on the United States and whose masters and officers are uncommissioned and unenlisted employees whose only relation to the United States is one of private contract with an officer of the United States.

The *Western Maid* decision (257 U. S. 419), is supportable only on the theory stated by this Court, namely, that it was a suit against property owned by a sovereign and therefore was an effort indirectly to collect money from the sovereign personally. But that decision is inapplicable where, as here, the suit is not against the sovereign's property, but against enemy-owned property which the United States, although using it as licensee or custodian, had not promised to keep free from liens or damages.

The fact that the United States, after the collision, by the Peace Treaty, accepted a voluntary deed or grant of the *Antigone* from her German owner, obviously does not modify the theretofore-existing relationships between the United States and its own citizens.

The theory of the *Western Maid* decision would be applicable here only if the United States had, at the time of the collision, promised to pay compensation to the German owners of the seized ships; in other words, if the original seizure of the *Antigone* should be regarded by this Court as an actual "taking" or requisition of the *Antigone*, on promise to pay compensation. But as we

show later in this brief, the United States merely intended by the seizure to sequestrate the seized ships and use them as licensee or custodian without claiming any property interest in them, and without promising compensation.

Another alternative would be that the United States confiscated the *Antigone*. The lower Court in this case virtually held that this was done. But we do not believe that this Court will affirm the decision of the lower Court that this savored of confiscation, or that an Act of Congress in violation of international law is constitutional. This constitutional question was apparently reversed by the Court in *Müller* v. *United States*, 11 Wall. 268, 305, for future decision.

The authority of the civilian Lynch was limited to taking over *possession*. This is shown by the letter from one of the Shipping Board Commissioners purporting to define his authority to act for the President and the Shipping Board.

In the nature of things, Lynch could not have been given authority to take over any property interest. A property interest in or title to the *Antigone* could only be taken by a court proceeding to detain, requisition or condemn her.

No effort was ever made to follow up Lynch's seizure by a court proceeding or action of any officer of the United States toward acquiring a property interest of any kind in the *Antigone*.

If the President and the Shipping Board had authority to take a property interest in the *Antigone* they did not exercise it either directly or through any officers or employees of the United States.

The seizure by Lynch, therefore, had no greater legal result than a seizure by the Alien Property Custodian under the later Acts of Congress. But a seizure by the Alien Property Custodian would merely be a taking over of possession as custodian or receiver for the private enemy owners and would transfer no property interests in the thing seized to the United States. Nor, in the absence of gross malfeasance would such a seizure impose on the United States or the Alien Property Custodian any of the personal obligations which would ordinarily be imposed on a private person owning an interest in property.

An injury to the property after the seizure would be suffered not by the United States or the Custodian, but by the private owner.

Similarly, a maritime lien liability created by the admiralty law against the seized property would be suffered not by the United States or the Custodian, but by the private German owner. The United States was therefore not directly or indirectly through its property being asked to pay for the physical injury or the collision lien. The United States, therefore, is not immune and having taken the property with the lien should account to the injured party. The theory thus contended for is in accordance with repeated statements by our public men.

Senator Knox on June 30, 1921, said in the Senate (Cong. Rec., Vol. 61, p. 3397):

> "The language the Senator has in mind only has reference to the thing that has already been done by the Alien Property Custodian. The whole theory is this: Speaking for myself personally, I

hope the day is not far away when we shall come back to the traditions of the American people that the right upon land of private property belonging to an alien enemy is a sacred right; that such property may be taken into custody only for the purpose of conservation; and that at the end of a war there shall be a strict accounting to the owners of that property by the Government of the United States, which may take it temporarily into its possession. That is one of the principles for which this country has contended for a hundred years. While, as Chief Justice Marshall said, the Congress may have the power to provide that the private property of alien enemies may be taken during a war, it can only do so by putting upon itself a moral turpitude of which we ought to be ashamed.

The purpose of the joint resolution is simply to hold in *status quo* the things that have been done by the Alien Property Custodian. The joint resolution simply states that until a suitable adjustment has been made of the claims of American citizens against Germany for the property that has been seized by Germany, the property in the hands of the Alien Property Custodian shall be held until Congress shall dispose of it."

In the "Camillus Letters" (written about 1795) of Alexander Hamilton, it is said:

"XVIII. No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and

laws, on account of controversies between nation and nation."

John Bassett Moore in his Digest of International Law, Vol. 7, page 308, says (italics ours):

> "Finally, without unnecessarily multiplying authorities on a point which is *undisputed*, we may quote from Hall the following passage:
>
> *'Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation.'"*

SECOND POINT.

The United States has failed to prove that the *Antigone* at the time when the collision occurred had a status which would prevent the ordinary maritime lien which arises from collision attaching to her.

When a collision occurs under the general maritime laws as enforced in our courts, a maritime lien arises against the negligent colliding vessel in favor of those damaged by the collision and the right to proceed *in rem* to enforce such lien is recognized universally by our courts.

The Palmyra, 12 Wheaton 1, 14;
United States v. *Brig Malek Adhel*, 2 How. 210, 233;
The John Frazer, 21 How. 184, 194;
The China, 7 Wall. 53;

The Merrimac, 14 Wall. 199;
The Clarita and The Clara, 23 Wall. 1;
Ralli v. *Troop*, 157 U. S. 386, 402, 403;
The John G. Stevens (1898), 170 U. S. 113, 120, 122;
Workman v. *The Mayor*, 179 U. S. 552, 572, 573;
The Barnstable, 181 U. S. 464, 467.

This maritime lien is a property right in the vessel herself. It is not a lien which depends in any manner on possession of the vessel by the lienor as might be supposed by any lawyer versed only in the common law.

Its nature was thus described by Mr. Justice Gray in delivering the opinion of this Court in *The John G. Stevens*, 170 U. S. 113, at page 118:

> "Accordingly, in our own law, it is well established that a maritime lien or privilege, constituting a present right of property in the ship, *jus in re*, to be afterwards enforced in admiralty by process *in rem*, arises, not only from a collision and for the damages caused thereby; *General Ins.* v. *Sherwood, The Rock Island Bridge, The Siren* and *The China*, above cited; but also for necessary supplies or repairs furnished to a vessel, whether under the general maritime law in a foreign port, or according to a local statute in her home port. *The Young Mechanic, The Kiersage, The Lottawanna, The J. E. Rumbell* and *The Glide*, above cited.
>
> Some years before the decision in *The Bold Bruceleugh*, Mr. Justice Story had recognized the

existence of a maritime lien, as well for damages by collision: *The Malek Adhel*, 2 How. 210, 234 * * *"

Again at page 120, he said:

"The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, *by whomsoever owned or navigated*, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text writers on both sides of the Atlantic, has been more clearly established, and more fully carried out, in this country than in England. Henry on Admiralty, sec. 75, note; Marsden on Collisions (3d ed.), 93."

At pages 122-123, he said:

"In *The China*, 7 Wall. 53, 68, by the application of the same principle, a ship was held liable for damages by collision through the negligence of a pilot whom she had been compelled by law to take on board; and Mr. Justice Swayne, in delivering judgment, said: 'The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or

by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors.' 'According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings.'

The same principle has been recognized in other cases. *The John Fraser*, 21 How. 184, 194; *The Merrimac*, 14 Wall. 199; *The Clarita & The Clara*, 23 Wall. 1; *Ralli* v. *Troop*, 157 U. S. 386, 402, 403.

* * * * * * * *

That the maritime lien upon a vessel, for damages caused by her fault to another vessel, takes precedence of a maritime lien for supplies previously furnished to the offending vessel, is a reasonable inference, if not a necessary conclusion, from the decisions of this court, above referred to, the effect of which may be summed up as follows:

The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, *jus in re*, a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem*, relates back to the time of the collision. The offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the wrong done. The owner of the injured vessel is entitled to proceed

> *in rem* against the offender, without regard to the question who may be her owners, or to the division, the nature or the extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern. All the interests, existing at the time of the collision, in the offending vessel, whether by way of part-ownership, or mortgage, or bottomry bond or of other maritime lien for repairs or supplies, arising out of contract with the owner or agents of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. Any one who had furnished necessary supplies to the vessel before the collision, and had thereby acquired, under our law, a maritime lien or privilege in the vessel herself, was, as was said in *The Bold Buccleugh,* before cited, of the holder of an earlier bottomry bond, under the law of England, 'so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim.' 7 Moore P. C. 285" (170 U. S. 122-123).

This maritime lien, therefore, arises and is enforcible *in rem* if negligence is established on the part of the vessel sued, whether it is in the hands of pirates, as in the case of *United States* v. *Malek Adhel,* 2 How. 210, 233, or of a compulsory pilot, as in the case of *The China,* 7 Wall. 53, or of a demise charterer whose servants navigated the vessel, as in the case of *The Barnstable,* 181 U. S. 464.

The doctrine of the offending thing which has been so

thoroughly established in our law seems to have only one exception so far as this Court has determined, namely, when the United States has a property interest in the vessel or has promised to keep her free from liens, and the vessel is engaged in a public service.

The Western Maid, The Liberty, The Carolinian, 257 U. S. 419;

Also:

Ex Parte State of New York, No. 1, 256 U. S. 490;

Ex Parte State of New York, No. 2, 256 U. S. 503.

In the present case, the United States confessedly not only did not have title to the vessel, but did not have any property interest in her and had not promised to keep her free from liens, because:

1. No prize court proceedings had been had to subject her to forfeiture, and

2. The steps taken by the President, acting through the Shipping Board, at most only purported to go so far as to take possession of the vessel—if indeed they could have gone further without resort to judicial proceedings.

This is shown by the Letter of Instructions to Anthony V. Lynch, to take possession of the *Antigone*, together with his return thereon (R. 43, 44).

At the time of the collision on October 9, 1919, the vessel was still registered in the name of the North German Lloyd in Bremen and neither the United States nor any other Government had ever put the steamer through the prize court for the purpose of detention, seizure, con-

demnation or otherwise, *Stimming's Affidavit* (R. 55)..

These questions of immunity are, of course, technical questions and should be dealt with strictly. Otherwise the rights of innocent persons may be improperly foreclosed.

The burden of establishing the right of immunity was on the United States. *Judge Hough's Order* (R. 24).

It is clear that the vessel was not technically in the possession of the United States at the time of the collision, because, as shown by the affidavit of Frank H. Phipps (R. 45-36), she had been placed *out of commission* in the Navy and, though transferred to the Army Transport Service, was in possession of master, officers and crew who are not shown to have had any commissions from the President and, therefore, not to have been officers of the United States within the meaning of the Constitution.

Furthermore, whether the vessel was actually in the physical possession of the United States or not, it is perfectly certain that the United States had not secured by any proper proceedings the *right* to any possession, and that, therefore, the *Antigone* was not *rightfully* in the possession of the United States.

It would seem to be quite clear that if, for example, the vessel had proceeded to a port such as Rotterdam, Holland, or Christiana, Norway, neutral countries, it would have been possible for the North German Lloyd, in such a port, to have filed a libel for possession and to have secured as owner an adjudication delivering the vessel to it, as was done by this Court at the instance of an English owner when we were neutral in the case of *The Appam*, 243 N. S. 124, 153, 154, and cases there cited.

It seems to us, therefore, and, it is respectfully submitted, that the Government has wholly failed to put itself within the exception to the ordinary rule of liability *in rem* laid down by *The Western Maid*, 257 U. S. 419.

Furthermore, as was pointed out by Judge Hough, the proceedings taken by the United States in the Court below amounted to *independent proceedings*. It was in effect an informal proceeding in prize by which the United States submitted itself to the jurisdiction of the Court to have the status of the *Antigone* and its rights with regard to her determined.

It did not adduce proper evidence to establish its right or to fix the vessel's status.

In *Ex Parte Muir*, 254 U. S., 522, 532, this Court said:

> "*Prima facie* the District Court had jurisdiction of the suit and the vessel, *The Belgenland*, 114 U. S. 355, 368-369, and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion. Merely to allege that the vessel was in the public service and under the control of the British Government as an admiralty transport was not enough. These were matters which were not within the range of judicial notice and needed to be established in an appropriate way. They were not specially within the knowledge of the libelant, nor did it have any superior means of showing the real facts. Thus from every point of view it was incumbent on those who called the jurisdiction in question to produce whatever proof was needed to sustain their challenge."

The United States was not represented by officers of the United States in prosecuting its anomalous proceeding, and the whole proceeding failed to show anything more than that:

1. The steamship *Antigone* at the time of the collision was documented at Bremen as a privately owned German vessel, and that

2. Certain abortive proceedings had been taken by the Shipping Board which resulted in the vessel, through what *mesne* process is not shown, being in the possession of a crew sworn in the Transport Service but not appearing to have had any commissions from the President and hence not being officers of the United States, and that

3. The vessel herself was not commissioned in any way as a public vessel. In fact she had just been de-commissioned from the Navy. (*Phipps affidavit*, R. 46.)

Thus the independent proceedings instituted by the Government really failed to establish a basis of immunity, and the Judge below was wrong in dismissing the libels on account of those proceedings because:

> *The proof was entirely insufficient to show sovereign possession or public status of the Antigone.*
>
> 1. She had no commission or certificate as a vessel of the United States.
>
> 2. She was merely an empty vessel without cargo (excepting a few boxes of household effects) or passengers, without a commission or certificate, excepting her German certificate, and without any

officer on board holding a commission from the President or the Secretary of War or Navy.

3. She was merely a vessel designed for private German purposes, which might be of some use to the United States Army if she arrived at France and was re-conditioned but which on October 9, 1919, was not commissioned or certificated as a vessel of the United States, either public or private.

4. There is nothing in the proofs to indicate that the Army office at New York had anything to do with booking cargo, passengers or troops for her proposed voyage from France to New York, and there is no evidence regarding the time when it was intended that that voyage should begin.

5. There is no proof that at the time of the collision the United States had obligated itself to compensate the private German owner for any damages suffered by the *Antigone* or collision liens incurred by her during her war service.

The United States had not then assumed the marine or war risks and could have afterwards returned her to her German owner subject to collision liens and in a physically damaged condition without incurring any personal liability. (See *Michigan Law Review*, Vol. 20, p. 416).

6. It does not even appear that the *Antigone* was not, at the time of the collision, flying the German flag, which she was entitled to fly under her uncancelled German merchant vessel's certificate of registry.

7. It does appear that she was not documented as a vessel of the United States until May 31, 1921, long after the collision (R., 51, 52).

Furthermore, immunity is not claimed by the only officers authorized to claim it.

The claim is made by two "Special Assistants" to the United States Attorney at New York in the latter's name (R., 15-25). No claim is made by the President or the Secretary of War or the Secretary of the Navy. Immunity from the ordinary jurisdiction of the courts can only be claimed by a political officer who is authorized to represent that the matter involved is political and not justiciable and whose dignity is such that his word can be accepted by a court without proof. Obviously, two "Special Assistants" to the United States Attorney (R., 25), using the United States Attorney's name, are not such officers. Such "Special Assistants" are not even officers of the United States.

The Attorney General of the United States has not signed the claim, nor did he appear at either the trial before Judge Hough or the trial before Judge Hand.

Moreover, we respectfully submit that the Attorney General would not be the proper person to present such a claim because he is not a political officer (at least in so far as he appears in the courts), but is an officer whose duty it is to represent the Government in matters which are justiciable.

The claim or suggestion should properly be made by the Executive as was done in the case of *The Exchange*, 7 Cranch 116, supplemented by an offer of a certified copy of the commission of the vessel as a vessel of the United States at the time of the collision and the testimony of or a statement from her captain who is commissioned by the President as an officer of the United States.

On the Government's brief filed with Judge Hand there was, to be sure, added to the names of the Special Assistants to the United States Attorney the name of a "Special Assistant to the Attorney General" (R., 56), but as he was not an "officer of the United States," and as he did not sign the claim or suggestion, this would seem to be immaterial.

Having taken such an independent proceeding, in the nature of a Prize proceeding, we submit that the United States submitted itself to the jurisdiction of the Court within the principle of *United States* v. *The Norwegian Bark Thekla*, 266 U. S. 228, and *The Siren*, 7 Wall. 152.

The contention, therefore, of the appellants is that under the situation shown in the record the case should be reversed and remanded with instructions that the appraised value of the steamship *Antigone*, which was fixed in pursuance of the Resolution of May 12, 1917, at $424,264 (R. 48-49), should be deposited in court with interest, and that the third parties damaged by the collision should be entitled to participate in and to maintain their claims against the fund as in the case of *The Siren*, 7 Wall. 152, in accordance with their several priorities.

The United States must take the consequences of its failure to follow orderly procedure and have the *Antigone* condemned by a Prize Court if they wished to take title to her as was done by England in the case of *The Marie Leonhardt*, 1921 Probate, 1, or requisitioned by an order of the Prize Court, as was done in the case of *The Edna*, 3 British & Colonial Probate, 407, 420, or requisitioned

on deposit of an undertaking for payment on an appraisal, as was done in the case of *The Pellworm*, 15 Asp. Maritime Cases, 101, and *The Wilhelm Hemsoth*, 13 Asp. Maritime Cases, 115, or else have to have had an order of detention against the vessel from a Prize Court, as was done in the case of *The Chile*, L. R. 1914 Probate, 212, 215.

What the President should have done in connection with the *Antigone* in taking her over for military use is shown in a decision of this Court in the case of *The Pedro*, 175 U. S. 354.

In that case, it is said at pages 361, 362:

> "In due course proof *in preparatio*, which embraced the ship's papers and the depositions of her master and first officer, were taken. The master appeared in behalf of the owners and made claim to the vessel, and moved the Court for leave to take further proofs. * * *
>
> The motion was denied, the cause heard on the pleadings and proofs *in preparatio*, and a decree of condemnation entered. Subsequently the Secretary of the Navy elected to take the vessel for the use of the United States pursuant to Section 4624 of the Revised Statutes. By order of Court she was duly appraised and delivered to the Navy Department, and the amount of her appraised value deposited with the Assistant Treasurer of the United States at New York, subject to the order of the District Court. From the decree of condemnation an appeal was prosecuted to this Court."

The procedure that should have been followed by the President in the case at bar is also indicated in *The Rita,* 89 Fed. 763 (Dist. So. Car. 1898), where the Court said:

> "The Spanish steamship *Rita,* heretofore condemned as lawful prize of war, was taken for the use of the Government, after appraisement, in accordance with Section 4624 of the Revised Statutes, and the value thereof, $125,000 is subject to the order of the Court in this cause * * *. The proof shows that the *Rita* was an unarmed merchant vessel."

Inasmuch as none of the proceedings thus suggested were followed, the *Antigone* remained a privately owned German vessel and at the time of the collision, for the reasons above stated, was not commissioned as a public vessel of the United States nor technically in possession of officers of the United States, and hence open to collision liens.

The confirmation of the title of the *Antigone* in the United States which was effectuated subsequently by Treaty, merely means that after the collision the United States took the *Antigone* with the collision lien involved in this case attaching to her and forms the basis discussed in the next point of the right to maintain this action under the Suits in Admiralty Act.

THIRD POINT.

This suit if brought against the *Antigone in rem* immediately after the collision, whilst the *Antigone* retained the status she then occupied, could not have been regarded as a suit in which the United States or any of its property in effect was being sued.

If the United States did not stand exactly in the position of the Alien Property Custodian it did hold possession merely as a receiver for the German owner and like any other receiver was not personally liable for the negligence of navigating servants whom it had used due care to select.

In Tardy's Smith on Receivers, Second Edition, 1920, Volume L., pp. 245-248 it is said:

> "The liability of the receiver is generally merely in his official capacity unless the negligence or tort is the personal act of the receiver himself. In such event it is a charge against the receivership property.
>
> In other words, the damages resulting from the negligence of the agents or servants of a receiver are a charge upon the receivership estate of the character of operating expenses and are payable out of the net income or in case of a sale of the assets of the receivership out of the sale proceeds.
>
> The rule in this respect was stated in the following language in an early case: *Davis* v. *Duncan*, 19 Fed. 477. See also *Farmers Loan & T. Co.* v. *Central R. Co.*, 7 Fed. 537, 2 McCrary 181.

'A receiver, as such, upon principle and authority, is not personally liable for the torts of his employees. Were he so liable, few men would take the responsibility of such a trust; it is only when he himself commits the wrong, that he is held personally liable. The proceeding against him, as receiver, for the wrongs of his employees, is in the nature of a proceeding *in rem*, and renders the property in his hands, as such, liable for compensation for such injuries.'

While a court of chancery appointing a receiver will throw around him its shield of protection in all necessary cases, yet it can not be recognized as a defense to a suit at law for a breach of any obligation or duty which was fairly and voluntarily assumed by him as receiver, that he is an officer of court acting under a decree of a court of chancery. The obligations and duties which the receiver assumes are, in all cases, and like all other persons, to be measured by the nature and character of the business which he engages in. Thus it can not be contended that the receiver who is the mere custodian of property, answerable only for its safe keeping and due return when called upon for that purpose, occupies a similar position with like responsibilities to the receiver, who by virtue of his official position is placed in possession of, and is charged with the management and control of a railway where he by virtue of his undertaking assumes the functions of a common carrier, and where in his dealings he is constantly brought in contact with the public. In the latter case his responsibilities are largely increased. The very nature of the business carries with it extraordinary duties and corresponding liabilities, and

> hence it is that courts are more disposed to charge this class of receivers with a greater degree of responsibility, and recognize in the public, and those dealing with them, greater privileges and greater facilities for relief, not only in matters purely *ex contractu* but more especially in matters *ex delicto*. *Blumenthal* v. *Brainerd*, 38 Vt. 402, 91 Am. Dec. 349."

In Tardy's Smith on Receivers, Second Edition, 1920, Volume 2, pp. 1555-1556 it is said:

> "A ship which is being operated by a receiver is subject to the same liability for maritime liens as under ordinary circumstances."

The present case is very similar in many respects to the cases of *Texas & Pacific Railway* v. *Bloom*, 164 U. S. 636; *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81; and *Gray* v. *Grand Trunk Western Railroad Co.*, 156 Fed. 736 (certiorari denied 207 U. S. 594). In those cases actions at law were permitted to be maintained against the companies which had been under receivership after the receivership had ended to recover compensation for injuries suffered from the receiver's operations. This was permitted because the company at the end of the receivership had taken over all the assets of the receivership, including betterments without judicial sale.

As said by this Court in *Texas & Pacific Railway* v. *Bloom*, 164 U. S. 636, 639-640:

> "Undoubtedly, if this were a controversy between a party whose claim originated while a railroad was in the control of a receiver appointed during a foreclosure suit and a purchaser at a

judicial sale decreed under that proceeding, the plaintiff's proposition would be a sound one. If the property sequestrated had gone to sale and a fund had been thus realized for distribution, then, upon notice appropriate to proceedings *in rem*, such a claimant would, in the absence of special and unusual circumstances, have been bound by the disposition so made.

But the present case is one in which no judicial sale was made and no fund realized for distribution by final decree after notice to and a hearing of those having claims against the fund. It was not the ordinary case of a sale and purchase in which compliance with stipulated conditions forms part of the consideration, and in which the extent of the burdens assumed is defined. Here, the railroad and its appurtenances, whose value was largely enhanced during the pendency of the receivership, were returned to the possession of the railroad company; and while it was proper for the court, in order to protect its receiver, to make an order for those who had claims against him to bring them forward for disposition, it by no means follows that the company took back its property free from all claims that may have originated during the receivership. Such might be the case if the claim originated in some personal delinquency of the receiver, for which he and his bondsmen could be held responsible. But where the claim was incidental to the ordinary management of the railroad, not attributable to personal misconduct of the receiver, and where the court which had appointed the receiver had not been put in possession of a fund by a foreclosure sale, but had, at the request of the company and its mortgage creditors,

restored its property to the railroad company, while such a claim was pending, we are unable to concede that an order of this kind that was made in this case precluded the plaintiff from enforcing her claim."

In *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81, 101-102, this Court said:

"It is also urged, in repetition of the argument that judgment *in personam* could not be recovered, that this suit as against the railway company was necessarily a proceeding *in rem*, and could only be instituted and the property charged in the court having jurisdiction of the *res*. In other words, the contention assumes that all the property of the company after the discharge of the receiver was still under the protection of the Circuit Court of the United States for the Eastern District of Louisiana in respect of subjection to his and like claims.

We are of opinion that these views are inapplicable to the case. This action was in itself in no sense a proceeding *in rem*, and the state court has held on other than Federal grounds that the company was directly liable. The property was no longer in the custody of the Circuit Court, and it had no possession that would be interfered with by the levy of an execution, so that defendant in error was not obliged to resort to an intervention in that court before he could collect, unless he was personally bound to do so by force of an adjudication to that effect operating upon him. In this connection it should be observed that the property was not sold but merely redelivered to the company.

> No judgment *in rem* was entered; no fund existed through a sale in foreclosure; the earnings far exceeded the debts during the temporary management; and it did not appear that either in reference to expenses incurred in the administration or in the matter of claims resting on controverted priorities, or otherwise, there were any equities to be adjusted which required the further exercise of jurisdiction."

In *Gray* v. *Grand Trunk Western Railway Co.*, 156 Fed. 736, 743, the United States Circuit Court of Appeals for the Seventh Circuit said:

> "The defendant in error, as purchaser of the property and successor to the fund, having no part in the alleged tort, if chargeable for the damages, is chargeable alone through liability assumed in the purchase and circumstances of succession; and then only, under the facts averred, in conformity with the principles of equity, if governed by the general doctrines above referred to. In such aspect, however, the case is, as we believe, directly within and ruled by the decision of the Supreme Court in *Texas & Pacific Railway* v. *Bloom*, 164 U. S. 636, 643, supplementing the prior decision in *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81, 99."

In *McNulta* v. *Lochridge*, 141 U. S. 327, 331-332, this Court said:

> "His (a receiver's) position is somewhat analogous to that of a corporation sole, with respect to which it is held by the authorities that actions will lie by and against the actual incumbents of

such corporations for causes of action accruing under their *predecessors* in office. *Polk* v. *Plummer*, 2 Humphreys, 500; *Jansen* v. *Ostrander*, 1 Cower, 670. If actions were brought against the receivership generally or against the corporation by name, 'in the hands of,' or 'in the possession of,' a receiver without stating the name of the individual, it would more accurately represent the character or status of the defendant. So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its *personnel* may be subject to repeated changes. Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasanaces, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands. As the right given by the statute to sue for the acts and transactions of the receivership is unlimited, we cannot say that it should be restricted to causes of action arising from the conduct of the receiver against whom the suit is brought, or his agents.

The defence is frivolous, and the judgment of the Supreme Court of Illinois must be affrmed."

FOURTH POINT.

This matter is justiciable and not political.

No question is raised regarding the right of the President under the Joint Resolution to *seize* the *Antigone*.

Nor is it suggested that any court proceeding was necessary *before* the seizure.

Nor is any question of the wisdom or expediency of the seizure raised.

The only questions are: Did the President seize the ship, and if so, what were the legal results arising from such seizure without subsequent prize court proceedings of any kind?

In the Government's brief in *United States* v. *Chemical Foundation* it is said:

> "The existence of a state of war or any other public emergency cannot and does not change the law or remove the limitations imposed by law upon the acts of officers or agencies of the Government in their relations to the Government or the people. To contend that the existence of an emergency would produce such a result would be to claim that such an emergency changed the nature of our Government from a government of laws to a government of men" (pp. 477-478).
>
> "It being thus made clear that all officers and agencies of the United States are officers and agencies of limited power in time of war as in time of peace and that these powers are conferred and limited by the Constitution and laws, it must of necessity follow that whenever the regularity of the exercise thereof (as distinguished from wisdom or expediency) is called into question and by a proper manner and by proper proceedings in a court of competent jurisdiction a 'case' is presented which that court must under the mandate of the Constitution adjudicate. Such issues are

and must always be 'justiciable' under our system of Government.

"Where it is a question of the existence or extent of the power it would seem that no question can ever arise as to the jurisdiction of the courts to determine the same. If these issues involve directly the construction and application of the Constitution and laws * * * it must be obvious that where Congress in exercise of its Constitutional functions confers upon an executive officer an executive power to be exercised when and as he may deem it wise, expedient or necessary to do so, then the exercise of that power to the extent authorized by law rests in his discretion and is based upon his sound judgment or opinion" (pp. 478-479).

"But a very different question is presented where the exercise of a power, the extent thereof, the limitations thereon and the legality of the exercise thereof, is raised. These questions may be raised in numerous ways. Existence of the power may be denied. It may be averred that the power granted has been exceeded. It may be claimed that the officer has proceeded upon a mistake of law and since the law is the grant and measure of his authority a 'taking' based upon a mistake of law is an unlawful act" (p. 480).

In the same brief, at page 217, it is said:

"Congress in providing for the seizure and sequestration of enemy property (which is all this act proposes to do as to the enemy) is dealing with the rights and interests of the enemy * * * Congress cannot confer upon the President or other executive officers legislative or judicial powers

even as to the seizure or sequestration of enemy property or the power to adjudicate a confiscation. It can only confer upon executive officers executive powers. The freedom from Constitutional limitations applies only as to the enemy and results from the disability of the enemy. It does not apply to acts of administration or internal affairs of the Government or between the Government and officers or agents of the Government and its citizens, although such acts may relate to property which prior to seizure had an enemy status. *Field* v. *Clark*, 143 U. S. 649; *Tillman* v. *Thompson*, 103 U. S. 168, 190; *U. S.* v. *Lee*, 106 U. S. 196; *Ex Parte Milligan*, 4 Wallace U. S. 113; *Brown* v. *U. S.*, 8 Cranch 110; *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81; *Semmes* v. *U. S.*, 91 U. S. 21, 25, 26.

"When, however, the property has once been seized and sequestrated a different question arises. We are no longer dealing with the rights of enemy, but the rights and powers of the Government or its officers in dealing with this property as acts of internal administration. This is a matter of domestic concern between the Government and its officers and citizens which is as completely controlled by the Constitution and laws of the United States in time of war as in time of peace.

"This important distinction will be clarified by an analysis of the several conditions.

If Congress had provided not only for seizure of this property but also for the confiscation thereof then upon the confiscation being adjudicated (a judicial function), the title and complete beneficial interests would have vested in the United States as public property. *Miller* v. *U. S.*, 11 Wal-

lace 268; *Kirk* v. *Lynd*, 106 U. S. 315, 317; *Semmes* v. *U. S.*, 91 U. S. 21, 25, 26.

"But the Trading with the Enemy Act was not an act of confiscation * * * It was only an act of seizure and sequestration with power of sale or converting into its equivalent in cash, the same to be held pending final action by Congress * * * The power was thus vested in the executive officers to seize the property. This was dealing with enemy rights. Once it was seized, however, the dealing with enemy rights ended so far as executive officers were concerned."

FIFTH POINT.

This suit is brought against the United States not because of any relation it had to the *Antigone* at the time of the collision on October 9, 1919, but because

1. A maritime lien for collision arose at that time on the *Antigone*.

2. Because this lien is a property right, and

3. The United States has taken over title to the vessel under the treaty, subject to this property right of the appellants.

At the time of the collision the United States, being merely a custodian or receiver to conserve the *Antigone*, was not personally liable for the collision damage.

The collision, however, created a lien on the *Antigone* because her only ship's paper was a German merchant vessel register, and she is not shown to have been in the

possession of an officer of the United States as defined by the Constitution.*

After the collision the Peace Treaty with Germany, so to speak, ended the Receivership and the United States took over the vessel assets, including the *Antigone,* under the grant and confirmation made by Germany in the Treaty.

This suit was then brought against the United States under The Suits in Admiralty Act, as a substitute for a suit *in rem* against the *Antigone.*

This form of action was necessary because the Act provides that a maritime lien on a vessel which has afterwards been acquired by the United States must be brought not against the vessel, but against the United States, according to the principles of libels *in rem.*

The case is the same as if the United States were to take a parcel of real property subject to a mortgage, the right of the mortgagee not being taken. If the United States had not accepted the grant of the vessel contained in the Peace Treaty this suit would have been against the *Antigone in rem* and the private German owner would claim her either directly or through the United States as receiver or custodian.

Furthermore, it should be noted in this connection that as a lien was created on the steamship *Antigone,* if the United States, through Congress, eventually determines to return the steamship or to account for her value to the German owners, the United States will be in a position either to turn back the vessel subject to the lien or to deduct from the value of the vessel whatever amount may be recovered in this proceeding.

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*Article II, Section 2, of the Constitution provides:

"The President shall * * * appoint * * * all other officers of the United States whose appointments are not herein otherwise provided for."

The situation of the German owners of the vessel was that of involuntary bailors, similar to the position of the Southern Pacific Company *vis-a-vis* the Director General of Railroads, in the case of *Standard Oil Company of New Jersey* v. *Southern Pacific Company*, 268 U. S. 146.

In that case this Court held that for a damage done to a vessel in possession of the Director General, the owner had not any right to recover against the United States except on the basis of a contract of indemnity.

There is, of course, no such contract of indemnity with the German owners in this case and, consequently, whatever recovery may be had against the *Antigone* will not come out of the United States, but, as the United States does not claim to have confiscated the *Antigone*, will be borne ultimately by her German owners.

SIXTH POINT.

The relation of the United States to the *Antigone* at the time of the collision was substantially that of a licensee. In April, 1917, it sequestrated her and in May, 1917, asserted the privilege of using her as licensee or trustee without confiscating or promising to pay for her use. In other words, the United States never "took" any property interest in the *Antigone*.

The Court of Claims correctly decided in the cases brought by the German ship owners that the United States neither confiscated the legal right to possess or use the *Antigone*, nor requisitioned it on payment of compensation; and that the United States during the war was merely asserting a privilege or license to use the

seized vessels, the acquirement of any property right of possession or title awaiting Congressional action or a peace treaty at the end of the war.

Before the Peace Treaty with Germany, which was executed after this collision, the United States never claimed and did not have any property right or interest (whether right of possession, title or otherwise) in the *Antigone*.

All that the United States claimed in April, 1917, was a right to sequestrate, and in May, 1917, a license to use. While using the *Antigone* under this license the United States remained merely a custodian or agent for the enemy private owners, the legal right of possession remaining in such owners.

The marine and war risks to the vessel during such licensed operation were borne by the involuntary licensors, the private enemy owners. The risk and the duty of the United States during such operation were merely those of a licensee or custodian, namely, the use of reasonable care in the selection of competent servants to navigate the vessel.

The *Antigone* was interned and therefore useless to her German owner at the time she was sequestrated in April, 1917, and at the time in May, 1917, when the United States asserted the privilege of using her as licensee without assuming the operating risks of any duty as a legal possessor or owner.

Therefore, there was never any "taking" by the United States of any property right in the *Antigone* before the voluntary grant to the United States contained in the Peace Treaty.

Moreover, the license was exercised solely for the purpose of minimizing and resisting dangers and damages

which were being caused by the sovereign whose nationals owned the seized ships.

The United States never claimed or exercised before this collision any right to use the *Antigone* for any other purpose than this minimizing of war damages, nor for any purpose of profit or otherwise entitling the German owner to have the license regarded in equity as a "taking."

The fact that at the time of the collision the *Antigone* had no commission from the President as a vessel of the United States, and the fact that no person on board her had a commission from the President as an officer of the United States, shows that the United States was using the *Antigone* merely as a licensee or custodian without asserting any legal right of possession or other property right in her.

This is confirmed by comparison with the mere privilege as sequestrator and licensee asserted by the United States in holding and using through the Alien Property Custodian other enemy-owned private property such as the chemical patents.

As a licensee of the *Antigone* the United States was not bound to return her at the end of the war to her German owners free from collision liens or other injuries suffered by her from risks and dangers caused by the sovereign whose nationals owned her.

As the United States at the time of the collision had neither seized nor claimed a property interest in the *Antigone,* nor promised to compensate her owner for the collision liens suffered by her during this special operation, it cannot be said that this is a suit on a cause of action for which the United States would have been liable immediately after the collision.

Both the economic and legal loss because of this collision lien (and other physical injuries suffered in this collision) would have fallen at that time on the private German owners.

It was only by the Peace Treaty entered into after the collision that there was granted to the United States the legal right of possession and other property rights in the *Antigone* and, of course, the United States then took that *res* or property subject to this then-existing collision lien, as well as subject to the unrepaired physical injuries which the ship had suffered during her war service.

The Attorney General of the United States in an opinion to the Secretary of the Navy on October 28, 1924, relating to a proposed form of agreement granting a non-exclusive license to certain patents owned by the United States, said (Opinions of Atty. General, Vol. 34, page 320, at page 325):

> "A license does not accomplish an alienation as does an assignment. * * *
>
> "Nor is it a lease. * * *
>
> "Nor an easement. It merely gives a right to do an act for a specific purpose and is inherently revocable. An easement is irrevocable. * * * An easement implies an interest in the property, while a mere license does not. An easement may pass by grant; a license may not. * * *
>
> "The distinction has been frequently pointed out in opinions of my predecessors. See for example, 16 Op. 152; 21 Op. 473; 31 Op. 463, 466. * * *
>
> "When the law has been so construed by Government departments during a long period as to permit a certain course of action and Congress has not seen fit to intervene, the interpretation so

given is strongly persuasive of the existence of the power. There has been no prohibition by Congress so far as I am informed of the granting of licenses of the nature proposed. * * *

"Usages have been established in every department of the Government which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. * * *

"Attorney General Gregory, 30 Op. 470, 482, said: * * * 'It is perhaps not too much to say, in view of this acquiescence in the practice, that Congress has in a sense recognized that the authority to permit a reservation to be crossed by a road or to be used for a ferry landing or a bridge might on occasion be extended by analogy to authorize a similar temporary occupancy by a street railway track. * * * The inherent limitation upon it, namely, that the trespass authorized must sub serve some purpose, useful or beneficial to the Government itself, is one that goes to the mode of exercise rather than to the existence of the power. * * * It being clearly understood that such permission creates no right, interest or franchise in the license and that, however long continued the occupancy is subject in theory and fact to immediate termination at any time at the will of the Government. * * *

"The construction of the law as to the implied powers of the head of a department to grant revocable licenses for occupancy of land arising from long continued exercise of such power without intervention by Congress is adverted to in many opinions of my predecessors in addition to that just quoted from. 18 Op. 344, 348; 22 Op.

13, 27, 240, 245; 29 Op. 205, 207. See also *U. S. v. Midwest Oil Co.*, 236 U. S. 459; *Ozawa v. U. S.*, 260 U. S. 178, 197.

"The licenses discussed above relate to permits to use temporarily real property of the Government and show an implied power arising by construction from long continued exercise of the power without Congressional interference. * * *

"I can by no course of reasoning persuade myself that a power long exercised with approval with regard to the use of the real property of the Government may not be exercised in the same way and to the same extent with regard to the Government's patent property.

"I therefore, am of the opinion that you have power to grant the license proposed."

SEVENTH POINT.

If construed as a confiscation, the resolution of May 12th, 1917, is unconstitutional because it violates international law.

The question was apparently reserved by this Court in *Miller v. United States*, 11 Wallace (U. S.) 268, 305, for future decision.

International law provides that:

1. Enemy merchant vessels in a belligerent's port at the outbreak of war are immune from confiscation; and

2. Even when the merchant vessel is armed and the seizure is lawful, an application must be

made promptly after the seizure to a District Court of the United States on its Prize side for an order of detention or condemnation.

In *Hamilton* v. *Kentucky Distillers Co.*, 251 U. S. 146, 156, Mr. Justice Brandeis, delivering the opinion of this Court said:

> "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations (*Ex parte Milligan*, 4 Wall. 2, 121-127; *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, 336; *U. S.* v. *Joint Traffic Assn.*, 171 U. S. 505, 571; *McCray* v. *U. S.*, 195 U. S. 27, 61; *U. S.* v. *Cress*, 243 U. S. 316, 326)."

In *Miller* v. *United States*, 11 Wallace (U. S.) 268, 305, this Court said:

> "It is argued that though there are no express Constitutional limitations upon the power of Congress to declare and prosecute war, or to make rules respecting captures on land and water, there are restrictions implied in the nature of the powers themselves. Hence it is said the power to prosecute war is only a power to prosecute it according to the law of nations, and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations. Whether this is so or not we do not care to inquire, for it is not necessary to the present case."

Justice Field, in his dissenting opinion, said (11 Wallace 268):

> "The war powers of the Government have no express limitation in the Constitution, and the

only limitation to which their exercise is subject is the law of nations."

In "Progress and the Constitution," page 77, by Newton D. Baker, former Secretary of War, it is said:

> "The Constitution of the United States overrides treaties and laws alike, and the President and the Senate might inadvertently in any one of a hundred ways enter into engagements which would be beyond their Constitutional power * * *
>
> There are many things which the President with the concurrence of both Houses of Congress may not do, and countries which enter into treaties with us must realize at their peril that the Supreme Court is the final arbiter as to whether or not the powers granted to the Federal Government have been exerted in a particular case."

It is the unique and characteristic duty of this Court to act as a curb on the acts of the President and of Congress for the purpose of restraining them within the limits of the Constitution. See "The Constitution of the United States," page 225, by James M. Beck, former Solicitor General.

Charles E. Hughes, then Secretary of State, in an address delivered at Philadelphia on November 30, 1923, referring to Latin America, said:

> "States have duties as well as rights. Every State on being received into the family of nations accepts the obligations which are the essential conditions of international intercourse. Among these obligations is the duty of each State to respect the rights of citizens of other States which have

been acquired within its jurisdiction in accordance with its laws.

"A confiscatory policy strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful co-operation is possible.

"Each State may have its code of laws in accordance with its conception of domestic policy, but rights acquired under its laws by citizens of another State it is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles."

At the Hearings of the House Committee on Merchant Marine and Fisheries, on December 15, 1920, with reference to the seized Steamer *Martha Washington*, the following colloquy took place between Mr. Chas. Evans Hughes and Mr. Hardy of the Committee:

"Mr. Hardy: * * * As I understand it, under international law, the private property, and justly so, of a private citizen of a country which may get into war with us, is really sacred.

Mr. Hughes: And ought to be."

In the brief of the Government in *United States v. Chemical Foundation*, 294 Fed. 300, it is said:

"* * * Confiscations of the private property of the enemy have met the universal disapprobation of the civilized world for nearly two hundred years" (p. 156).

"9. It is to be presumed that Congress, by the amendment of March 28 (to the Trading with the Enemy Act), did not intend to violate the 'law of nations' by authorizing confiscation of enemy property, unless the act clearly so directs" (p. 196).

"That public opinion of the civilized world has been against the confiscation of private property of the enemy in time of war for at least two centuries, up to the termination of the World War, is universally recognized" (p. 198).

"With the growth of Christianity, the practice of enslaving the defeated enemy gradually disappeared, but the practice of seizing his property continued. It early developed that the seizure must inure to the benefit, not of the individual members of the victorious army, but to the sovereign power of the nation. Then with the growth of commercial intercourse and with the progress of civilization, the idea that both the person and the property of the individual enemy was free from confiscation, although both might be arrested or impounded as a measure of safety during the war developed" (p. 202).

"* * * The policy of the United States and the modern policy of all civilized nations has forbidden the exercise of the power, which is admitted to exist in Congress, to confiscate alien property seized on land outside of the military zone in time of war" (p. 574).

In "Standards in International Law" in the Harvard Law Review, Vol. 34, page 777, it is said:

"In the field of international law the protection of national interests of substance on the one hand and of personality on the other calls for the ap-

plication of the same guiding principles in their recognition and delimination. Questions of the rights of nations over adjoining bodies of water, of what are territorial waters, of immunity of government owned property from judicial interference (for the American doctrine, see: *The Siren*, 7 Wall. (U. S.) 152 (1868); *The Davis*, 10 Wall. (U. S.) 15 (1869); *Stanley* v. *Schwalby*, 147 U. S. 508, 512, 515 (1893); *Johnson Lighterage Co.*, No. 24, 231 Fed. 365 (1916), and others), of international regulations of commerce, open a large field for the logical application of fixed rules in the interests of certainty, while the conduct of a nation in the society of nations raises much the same problem as the conduct of an individual in society in general. It can best be regulated with a view to some degree of individualization and consideration of circumstances, by means of standards, as, for example, the standard of reasonable action of civilized nations in the circumstances. * * * Judge Cardozo seeks the common element which pervades these precepts and sets up the standard that treaties are abrogated in the circumstances of war only in so far as and to the extent that 'their execution is incompatible with war'. (See 1 Kent Commentaries, 12th Edition, 176; Scott Resolutions of Institute of International Law, 172; Bluntschi, Le Droit International 'Codifie,' 5 ed. § 538). The clause of the treaty in issue, between the United States and Austria, gave reciprocal rights of inheritance to the subjects of each country in the lands of the other (See 9 Stat. at line 944). It was upheld as subsisting because to do so seemed 'most in keeping with the traditions of the law, the policy of the statute, the dictates of fair dealing, and the honor of the na-

> tion.' On principle, this standard, recognizing the duty of sovereign nations to live up to their contracts and excusing performance only where it is impossible, seems eminently sound and should gain a large following in the courts the world over. The liberality of such opinions as that of Judge Cardozo, must open the way to the ultimate effectiveness of international law."

Referring to the case of *Brown* v. *United States*, 8 Cranch. 110, which involved the question of the confiscability of private enemy property on land by judicial proceedings in the absence of Congressional authority, John Bassett Moore has said:

> "On the theory that war renders all property of the enemy liable to confiscation, Mr. Justice Story, with concurrence of one other member of the court, maintains that the Act of Congress declaring war, of itself, gave ample authority for the purpose. The majority held otherwise and Marshall delivered opinion referring to the practice of nations and the writings of publicists. He declared that according to 'the modern rule' tangible property belonging to an enemy and found in the country at the commencement of war ought not to be immediately confiscated; that 'this rule' seemed to be 'totally incompatible with the idea that war does of itself vest the property in the belligerent government'; and consequently that the declaration of war did not authorize the confiscation. Since such effect was thus given to the modern usage of nations, it was unnecessary to declare as he did in the course of his opinion that 'war gave to the sovereign full right to take the persons and confiscate the property of the

enemy wherever found,' and that 'mitigation of this rigid rule which humane and wise policy of modern times has introduced into practice' though that 'will more or less affect the exercise of this right' 'cannot impair the right itself.' Nor were the two declarations quite consistent. The supposition that usage may render unlawful the exercise of a right but cannot impair the right itself is at variance with sound theory. Between the effect of usage on rights and on the exercise of rights, the law draws no precise distinction. A right derived from custom acquires no immunibility or immunity from the fact that practices out of which it grew were ancient and barbarous. We may, therefore, ascribe the dictum in question to the influence of preconceptions and turn for the true theory of the law to the opinion of the great Judge delivered twenty years later in which he denied the right of the conqueror to confiscate private property on the ground that it would violate 'the modern usage of nations which has become a law.' *United States* v. *Prechemen,* 7 Peters 51." (Extract from address on "John Marshall," Political Science Quarterly XVI, 400, quoted in Moore's Digest of International Law, vol. 7, pp. 312 and 313.)

The American Delegation to the Second Hague Peace Conference, in its report to the Secretary of State of the United States, stated that the privilege enjoyed by enemy merchant vessels in port at the outbreak of hostilities "had acquired such international force as to place it in the category of obligations" (Foreign Relations, U. S., 1907, Vol. II, page 1158).

The modern tendency among civilized nations is to accord the same treatment to enemy ships tied up in the ports of a country on the outbreak of hostilities as to property on land. This attitude is reflected in Articles 1 and 2 of the Sixth Hague Convention (1907), which read as follows:

> "Article 1. When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.
>
> The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.
>
> Article 2. A merchant ship unable owing to circumstances of force majeure, to leave the enemy port within the period contemplated in the above article or which was not allowed to leave, can not be confiscated.
>
> The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war or requisition it on payment of compensation."

It may be said that the reference to the Hague Conventions is not to the point because the American delegation did not sign this particular one. The refusal to sign, however, was based upon their view that the articles in question did not go far enough to express what

had already become an absolutely binding obligation so far as the United States was concerned. The report of the American delegation on this point is printed in full in Foreign Relations of the United States, 1907, at page 1158.

And, as the practice of governments serves to illustrate the conceptions of law which they hold, it may be useful to observe that neither at the outbreak of the war between the States nor at the outbreak of the Spanish War was any impediment offered to ships owned and registered in the Confederate States in the one case, or in Spain in the other, freely departing.

The power of this Court to enforce international law was granted by the Constitution and cannot be modified by the legislative or executive branches excepting by the execution of treaties or conventions.

As this Court said in *MacLeod* v. *United States*, 229 U. S. 416, 434, the Act of Congress must be construed "in the light of the purpose of the Government to act within the limitation of the principles of international law."

District Judge Hand in his opinion in the present case (R. 56), begged the question when he said "international law will be enforced in our courts, but not in the face of a Constitutional act of Congress."

The larger issue, of more momentous inquiry and far-reaching consequence, is not whether a statute pursuant to the war powers of Congress must be preferred above the rule of the law of nations, but whether an Act of Congress in derogation of the law and usage of nations and the treaties of the United States affirming its understandings, is constitutional if it operates to defeat

by confiscation the legal right of possession of aliens (though former enemies) guaranteed to them by treaty of the United States and its express contract aiming at perpetuity and consistent with international law.

Such a statute cannot be constitutional unless, consistently with the law of nations, it be read to imply an obligation on the part of the United States to make restitution or equitably to indemnify the injured individuals or the Government representing them.

Judge Hand, later, in his opinion, however, indicates a doubt whether the proposition as stated by him is correct, by falling back on the Treaty of Peace with Germany in August, 1921 (almost two years after the collision), commenting that it "would seem to confirm all Departmental orders regarding the transfer of German property" (R. 57), thus indicating that possibly something further than the acts of the legislative and executive branches was necessary to confirm the Government's tenure.

The eagerness of the Department of State, which became a matter of common knowledge, to conclude this treaty with Germany, is also strongly evidential of something further being requisite.

It is clear from Judge Hand's opinion that he did not regard the present case as governed by the theory of this Court in the *Western Maid,* 257 U. S. 419, which presupposes absolute title in the United States and which theory has been the subject of widespread dissent. See 56 American Law Review 770; 10 Cal. Law Review 333; 20 Michigan Law Review 533; 22 Columbia Law Review 589.

Even putting the question as Judge Hand stated it (R. 57), the fundamental inquiry should at least have

been whether as between the statute supplemented by the subsequent Treaty of Peace with Germany and the rule of international law calling for proceedings in Prize, "any other construction" remained, to quote Marshall in *The Charming Betsey,* 2 Cranch (U. S.) 64, 118, than that which warranted the Court in adjudicating that a statute alleged to be a violation of international law was paramount in obligation to it.

Assuming, for the purpose of argument, that Judge Hand was correct in stating that the treaty entered into after the collision and after the present suit was begun, was retroactive so as to extinguish the theretofore existing collision lien of the appellants, the fundamental and important issue still remains whether the Resolution of May 12, 1917, supplemented by the treaty with Germany in 1921, which are in conflict with the more fundamental modern usage of nations in respect to the immunity of private, non-combatant enemy property from confiscation, can be held to be constitutional.

The constitutionality of the Resolution must, we respectfully submit, be qualified, if not impeached, unless it be construed to imply ultimate restitution of these merchant ships or equitable indemnification therefor or reparation.

That this construction must enter into the statute and equally into the treaty appears to be beyond doubt; "as to such matters as were by the Constitution committed to the custody of the Federal Government, there were applicable thereto the law of nations, the maritime law, the principles of equity and the common law" (SHIRAS, *J.*, in *Murray* v. *Chicago Company,* 92 Fed. 868), at least as a principle of construction and interpretation.

The powers of Congress in peace and in war, as well as the treaty authority, respond to the law of nations "as understood in this country."

It is axiomatic that no single nation can change the law of nations adversely to its general moral, if not everywhere constitutional, obligation, an obligation by inherent limitation under the Federal Constitution of this country; and it is peculiarly the view of the common law that the municipal laws of a country cannot change international law (*The Scotia,* 14 Wall. 170, 187; *The Paquete Habana,* 175 U. S. 677, 711; *The Insular Cases: Downes* v. *Bidwell,* etc.).

The major question then turns upon judicial construction in a case of appropriate jurisdiction.

It is by a "superintending judicial authority," said Mr. Justice Wilson in *Chisholm* v. *Georgia*, 2 Dallas 419, 466, that the law of nations and the treaties of the United States will be enforced, and it is in this sense that the judicial power transcends "the ordinary legislative and executive powers of the general government, and the powers which concern treaties." Ibid, p. 425; Cooley Constitutional Law (3rd Edition), p. 123.

As Marshall (before becoming Chief Justice declared in Journal, House of Delegates, Virginia, January 22, 1799, p. 90) cases within the cognizance of the courts which arise under the Constitution "are triable by a rule which exists independent of any act of the Legislature or Union."

The present case, which arises under the law of the sea and of nations approved by the Constitution and affirmed by treaty of the United States, must be determined wholly by international law.

The Court will recall that Marshall, in the case of *Brown* v. *United States,* 8 Cranch 110, 129, held that the mitigations of the "rigid rule which the humane and wise policy of nations has introduced" (against confiscations of private property) "into the practice of nations, though they will more or less affect the exercise of this right, cannot impair the right itself."

But of this, John Bassett Moore, before his recent appointment as a Judge at the Hague, and while Professor of International Law at Columbia University, commented (in a note in Dillon: Marshall, Life, Character and Judicial Services, Vol. 1, p. 566):

"The supposition that usage may render unlawful the exercise of a right but cannot impair the right itself, is at variance with sound theory."

Marshall later abandoned his preconceptions and held in United States v. *Percheman,* 7 Peters U. S. 51 (see also the discussion in Dillon, *supra*), *"that the modern usage of nations which has become law," constrained the United States and its courts.*

Thus he holds that the Eighth Article of the Treaty of St. Ildefoso "must be intended to stipulate expressly for the security to private property, *which the laws and usages of nations without express stipulation would have conferred* • • •. The construction which we now give the article must enter into the construction of Acts of Congress upon the subject" (italics ours).

This doctrine, ultimately adopted by Marshall, applies to the immediate inquiry whether the securities afforded by the early Prussian treaties are of such character as to constrain the Federal Courts in the course of appropriate judicial proceedings to read into the construction of war

time acts of Congress and the Treaty of Peace their understandings.

Article XXIV of the Prussian Treaty of 1799, notably stipulates:

> "It is declared that neither the pretense that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and of nations."

Article XXIII, touches and concerns the property of "merchants of either country, then residing in the other" and "in general, all others whose occupations are for the common subsistence and benefit of mankind."

But it is not necessary in the present case to rely on the Treaty with Prussia, because, as said repeatedly by this Court in the decisions already cited and in *Pollard v. Kibbe*, 14 Peters, U. S. 353, 402, *the principle of the security of private property sequestrated by conquest has been consecrated by "the usage of the civilized world."*

In this connection it is important to distinguish between the continuing obligation of treaties affirming new understandings of the law of nations and those which, in respect of legislative modification and repeal, are within *the power of Congress* (see 7 Minnesota Law Review, 113).

Hamilton writes: "Treaty stipulations which are designed to operate in case of war preserve their force and obligations when war takes place" (5 Hamilton's Works,

Lodge Edition, 126), and "our treaties and the law of nations form a part of the law of the land" (4 Hamilton's Works, Lodge Edition 146).

"An established rule of the law of nations can only be altered by agreements between *all* the civilized powers, or by a new usage, generally adopted and sanctioned by time" (5 Hamilton's Works, Lodge Edition, 218).

This Court, speaking through Chief Justice Marshall, in *Society, etc.*, v. *New Haven*, 8 Wheat. (U. S. 464-494), said:

> "We think that treaties stipulating for permanent rights and general arrangements and professing to aim at perpetuity and to deal with the case of war as of peace are at most only suspended while it lasts; and unless they are waived by the parties and new and repugnant stipulations are made, they revive in their operations at the return of peace."

"That treaties may amount to a law of nations follows from the definition of that law" (2 Madison's Works, 260, published by order of Congress).

If such be their nature, their legislative modification or repeal finds positive limitations, and this whether they be considered as repealing or affirming the general law, making exceptions to it, which are to constitute a particular law, or whether explanatory of the law of nations.

Judicial power and cognizance in the Federal Courts must on the one hand operate to constrain legislative enactment with respect to their modification or repeal, and, on the other, in case of appropriate jurisdiction, serve to

determine the constitutionality of the act of the Government in question.

Treaties stipulating for rights or establishing a usage consistent with the law and modern usage of nations and that those principles which lie at the foundation of our jurisprudence, if obligatory on the courts (Marshall, C. J. in *The Peggy*, 1 Cranch (U. S.) 103), cannot be less obligatory on the political branches of the Government, or, to say the least, upon an officer of the United States acting under a statute contravening their formal written understandings regarding the intent of the law of nations.

The early treaties between the United States and Prussia, assuring in effect the restitution, as well as the security of private enemy owned property upon the coming of peace, are therefore not only a recognition of a theretofore existing rule of international law, but are themselves a part of the international law which should be enforced by this Court.

It is significant that these early treaties with Prussia were regarded by the political branches of the United States as being so well settled a part of international law that it was not deemed necessary even to mention them in framing the more recent Treaty of Peace and Executive Agreement with Germany.

If, as the Government's claim in the present case alleges, the United States acquired by the seizure of the *Antigone*, a lawful right of possession, why was it necessary for this Government afterwards to have the German Government render that possession more valid by formal treaty?

Under the Treaty of Peace with Germany of August 25, 1921, the satisfaction of all private American claims

against Germany and the confirming to the United States "of seizures" imposed or made by the United States during the war, are the salient or expressed conditions upon which turn the retention of German property in the possession or control of the United States.

There is the further condition that by reference to the Treaty of Versailles, should these conditions not be fulfilled and confiscation ensue, Germany will indemnify her citizens pursuant to the understandings of that treaty; that this indemnification in practice has proven so far from equitable as to amount to confiscation.

"A right once vested does not require for its preservation the continued existence of the power by which it was acquired" (see 55 American Law Review 877).

The immunity under the treaties between the United States and Prussia of the *Antigone* and other merchant vessels in United States ports at the outbreak of war, from confiscation was within the protection of the Constitution and the law of nations as understood in this country and any treaty of the United States, law or executive authority must contemplate and recognize that immunity.

The *Antigone* was, therefore, at most in the *custodia legis* of the United States and could not in any real sense be said to be a vessel of the United States entitled to immunity from liability as an essential tool or part of the sovereign.

The resolution should, so far as the present case is concerned, be regarded as a confiscation because:

(a) If the resolution is ambiguous as to whether it is confiscation or requisition on pay-

ment of compensation the most favorable construction should be given to maritime lienors until the question of construction is finally determined by Congress, the President, or the Hague Tribunal.

(b) The resolution does not provide for compensation.

(c) The United States has waited eight years without promising or paying compensation or setting aside the appraised value as a tentative compensation fund.

(d) The treaty of Versailles, which was agreed to in this respect by the United States in the second article of its treaty with Germany in August, 1921, confiscates these ships to the Allies, thus interpreting the Resolution of May, 1917, as a confiscation.

(e) The United States Court of Claims, by refusing compensation, has virtually decided that the Resolution was a confiscation. An appeal has been taken to this Court from this refusal of the Court of Claims. This Court can, of course, take judicial notice of its own records showing this construction and refusal.

(f) The Secretary of State of the United States has not replied to or complied with the note of the German Ambassador delivered on August 12, 1925, demanding the return of all German private property (including the *Antigone* and other German merchant ships) seized in the United States during the war, on the ground that all claims of American nationals against Germany and German nationals have now been amply provided for by the Dawes Plan and the London Con-

ference. On inquiry by this Court, Secretary of State Kellogg will disclose the part of the note which is relevant to this case.

EIGHTH POINT.

The President did not seize or take over the possession of the *Antigone* after the adoption of the Resolution of May 12, 1917.

1. The uncontradicted evidence shows that the *Antigone* was seized "in April, 1917" (R. 55), a month before the adoption of the Resolution, by "certain persons purporting to represent the United States" (R. 55) "who came aboard the said steamer and took possession thereof and removed the master and crew, and that the master protested to said persons against the seizure of the ship" (R. 55).

The provisional half-hour of Lynch on board the *Antigone* on July 17, 1917, at Norfolk was clearly not a taking over of possession (R. 27).

Lynch testified:

"Question. How long altogether were you on board the *Neckar* (the *Antigone*)?

Answer. Not to exceed half an hour (R. 28).

Question. Did you leave the ship then?

Answer. I left the ship then.

Question. Returning to New York?

Answer. I am not quite clear whether I returned to New York or went on to Baltimore" (R. 28).

Lynch was not an officer of the United States. He held no commission from the President. Constitution U. S., Article 2, Section 2. He was merely a civilian appointee of one of the several commissioners of the United States Shipping Board. There was no proof that he was ever appointed an officer of the Shipping Board by a resolution of the Board or otherwise, nor that the majority of the Board authorized his appointment as an agent.

He was authorized only to "take possession" (R. 43) of the *Neckar*. Possession is physical control. Physical control of the *Antigone* was already in undisclosed persons and was not displaced by Lynch.

No officer of the Shipping Board was called or any documents offered to show that the majority of the commissioners of the Shipping Board had authorized the writing of the letter of July 14, 1917, by John A. Donald, Commissioner, to Lynch (R. 43). Lynch was to take possession "in the name of the United States Shipping Board" (R. 43), yet every paper offered by the United States Attorney indicates clearly that the Shipping Board never had possession of the *Antigone* before March 19, 1921 (R. 51), more than a year after the collision, at which time her first provisional register as a vessel of the United States was issued (R. 51).

Lynch was not an officer either of the United States or of the Shipping Board. Therefore, neither the President nor a Commissioner of the Board could delegate to him the authority conferred on the President by the Joint Resolution of May 12, 1917.

In *Burnap* v. *United States*, 252 U. S. 512, 514, 516, Mr. Justice Brandeis, delivering the opinion of this Court, said:

> "The Constitution (Art. II, Sec. 2) confers upon the President the power to nominate, and with the advice and consent of the Senate to appoint, certain officers named and all other officers established by law whose appointments are not otherwise therein provided for; but it authorizes Congress to vest the appointment of inferior officers either in the President alone, in the courts of law or in the heads of departments (6 Ops. Atty. Gen. 1) * * * The term head of a Department means, in this connection, the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet. It does not include heads of bureaus or lesser divisions. *United States* v. *Germaine*, 99 U. S. 508, 510. * * * The distinction between officer and employee in this connection does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto."

In the Government's brief in *United States* v. *Chemical Foundation*, 5 Fed. (2nd) 191, it is said at page 254:

> "In no instance was the name of any person used but the performance of the duty or exercise of the power was required of the office. When it

came to dealing with this particular duty, however, the President seemed to realize that the power and discretion given was personal and he therefore undertook for the first time so far as we recall in the history of the Government to vest an important executive power and discretion of the President in a particular person as an individual and not as an officer or office. * * * The Court in its opinion (R. 49-30) entirely misapprehends the position of the Government on this point. It is there stated that the contention is based upon the failure of Mr. Polk to put the words 'counselor of the State Department' after his signature. The Government makes no such contention. It contends that the President had no authority under the act to delegate this power at all; that he certainly had no authority delegated to an individual as distinguished from an office or officer."

1. The perfunctory and momentary seizure in July, 1917, after the Resolution was adopted, was not a real taking of possession. There is no proof that the seizure in April, 1917, was by the President or by any one having authority from him.

2. The President was authorized "to take over the immediate possession and title" to the vessels.

The Resolution should be construed in the light of international law and of the other applicable Acts of Congress which were not inconsistent with the Resolution and were not repealed by it.

The Resolution assumes that the President will do the acts which are necessary under international and municipal law to constitute a taking of possession of such vessels in time of war. The claim alleges merely the performance of one act—seizure.

It does not allege performance of the other necessary acts of

(a) Applying to a Prize Court for approval of the seizure by an order of detention or requisition; or

(b) Issuing a commission or certificate to the vessel as a vessel of the United States.

3. The President did not deposit the appraised value of the *Antigone*. The Resolution should be construed as contemplating that the seizure would be followed by deposit of the vessel's appraised value with a district court or an Assistant Treasurer of the United States in accordance with the long-established municipal law and Acts of Congress relating to seizures.

In the Government's brief in *United States* v. *Chemical Foundation*, 5 Fed. (2nd) 191, at pages 62 and 63, it is said:

"In the absence of appropriate legislation, neither the executive nor the judicial branch of the Government, nor any officer or agent thereof, from the President on down, has any power or authority to seize, condemn, confiscate or otherwise dispose of such property.

It necessarily follows from this that when Congress does authorize any action by the executive with respect to such property, the power and authority thus granted is confined to the limits prescribed by Congress, and must be exercised in the manner thus directed. The suggestion made in this case that the President has any power or authority to deal with property of this character

under the so-called war powers of the President, as Commander in Chief of the Army, or under any direct constitutional power or authority, is wholly without warrant at law, and is expressly denied by the decisions of the Supreme Court. Whatever power or authority the President or any other officer may have as to such property must be found in some Act or Acts of Congress, and the President, as well as any other officers vested with any power or authority over enemy property, must act strictly in accordance with directions of Congress, subject to all of the limitations imposed by the express terms of the Acts, as well as the rules of law and equity applicable thereto."

NINTH POINT.

The District Court had no jurisdiction on its admiralty side to entertain the claim of the United States. The Court should therefore have granted the motion of the libellants to transfer the claim proceeding of the United States to the prize side and permit the collision libels to be proved as cross suits or intervening claims in that proceeding.

1. The only proof that is competent for an admiralty court to receive to show the present status of a vessel is

(a) a claim of immunity by the President or the Secretary of War or the Secretary of the Navy; or

(b) a copy of the President's or the Secretary of War's commission of the vessel as a vessel of

the United States, together with the testimony of or a claim or statement by the master of the vessel who is commissioned by the President as an officer of the United States (Constitution U. S., Article 2, Section 2).

The failure of the United States Attorney to present the claim in either of these ways and his reliance on a forceful seizure *jure belli* as a source of right of possession really made his claim an action to quiet or establish right or possession or to have the *Antigone* declared a prize of war. Such claim proceeding was not within the jurisdiction of the District Court on its admiralty side, but could be entertained on its prize side.

In *The Appam*, 243 Federal 230, 233 (S. D. & Y.), Circuit Judge Hough said (pp. 233 and 234):

"The captor's title was subject to the action of a competent prize court, and to that extent was inchoate. This ship and lading never got before a prize court. The captor's title and possession was forfeited, not for any violation of international law, but for an infraction of American law, and restitution decreed because of a violation of American neutrality * * * These cases (and others new and old) rest, however, on the assumption that what is before the court is a seizure *jure belli*, that the case is one of prize, and that consequently all incidental matters arising between the parties in interest, not only may be adjusted but must be adjusted in the prize court, whose jurisdiction is exclusive, once the fact of prize is established, which fact also must be there adjudicated. *The Siren*, 7 Wall. 162, 19 L. Ed. 129."

In *The Peterhoff*, 19 Fed. Cas. No. 11025 (Dist. Ct. S. D. New York) Judge Betts said (at pp. 356, 357):

"In matters of prizes held for adjudication, the tenure of the property seized is eminently qualified, provisional and destitute of absolute ownership. The captors, by the universal rule of the modern law of civilized nations, became only keepers of the arrested property, for the purpose of submitting it to judicial inquiry and judgment; *the question of its confiscability for violation of the laws of war preceding and overriding all other questions of title or possession by the captors. It would constitute an undeniable outrage on those laws for the government of the United States, through any of its departments, executive, judicial or military, to appropriate this prize or its proceeds, mero motu, without the preliminary of a legal scrutiny and condemnation, prosecuted in due form of legal procedure.* The distinction between the capture of property by a belligerent during the war waged on land, and a prize seizure, is as definitely marked in consequence and effect, as if the two had no common foundation of authority. 1 Kent, Comm. 101, 102, note 6; Halleck, Int. Law, c. 30, Sections 1, 4. When property is captured on land by a belligerent, the title passes and is vested so soon as the capture is complete, and the property then belongs absolutely to the sovereign. In regard to a prize taken at sea, the right of property is not changed by the seizure alone. The prize remains in the hands of the captor, lawfully sequestrated, under a species of trusteeship, awaiting a trial at law in the courts of the nation seizing it. While undergoing the processes of law necessary to ascertain its character, it is exempt from all power of

> the captors other than that of safe-keeping for the purposes of trial, and of determining its culpability. *Until the decree of the prize court has transferred the title of the prize to the capturing power, the lawful proprietorship continues with the original possessor, subject to no other use of appropriation by its occupant than that of safe-keeping under arrest, pending judicial proceedings seeking its forfeiture.*"

In *Sawyer* v. *Maine, etc., Insurance Co.* (12 Mass. 291) the question arose in an insurance case whether the decree of the Minister of Justice in Haiti, condemning the vessel for breach of blockade, was conclusive. It appeared that the master of the vessel, on entering Port au Prince, was seized and brought before the King, who informed him that he "wanted the provisions" contained in the cargo. The master objecting, he was carried before the "minister of justice so-called," who read him a sentence of condemnation of the vessel. The Court rejected the decree, observing (p. 295):

> "Waiving all question as to the character of the government, under which the seizure of the vessel and the decree of forfeiture took place, it certainly is essentially defective when attempted to be applied to this contract of insurance. For it does not appear that any libel was filed, and monition issued, any hearing had, or that any of those formalities had taken place, which are necessary to give a conclusive operation to decrees of foreign courts. For aught that appears from the copy of the proceedings before us, the forfeiture was decreed by mere arbitrary power, without any trial; and that some of the forms of jus-

tice, used in civilized countries, had been assumed, without any regard to the substantial requisites of a judicial inquiry."

See also the vigorous expression of the same principle by Justice Story in a case of attempted administrative forfeiture for a violation of the revenue laws (*Bradstreet* v. *Neptune Insurance Company*, 3 Sumner, 600).

It is now the accepted rule, both in international law and under our Constitution, that the condemnation, to be effective, must be by a judicial tribunal, and that no administrative substitute can take its place.

In *The Appam*, 243 U. S. 124, no rights of the captor with respect to the uncondemned prize was permitted to deter judicial inquiry whether the act bringing the vessel into the waters of the United States constituted a violation of American neutrality or prevent restitution when it was once determined that such conduct was to be so regarded. The Supreme Court of the United States held that the mere seizure or capture was not sufficient to transfer title or the right to permanent possession.

In *The Siren*, 22 Fed. Cases No. 12911 (District of Mass.), District Judge Lowell said (pp. 234 and 235):

> "The prize act of 1864, c. 174 (13 Stat. 306), treats the subject chiefly as it concerns naval captors, and *does not profess to deal with the subject of prize generally and fully. It cannot be doubted that there may be a seizing or taking jure belli of enemy property within the ebb and flow of the tide which is neither by public nor private*

armed ships, as for instance, by a direct surrender to civil officers, &c. The celebrated order in council in England, passed March 6, 1665-66, reported, among other places, in Hay & M. 50, which declares the right of the lord high admiral, mentions many instances of prize which are droits of the admiralty, such as 'enemy's ships and goods casually met at sea and seized by any vessel not commissioned,' &c. Now, in England, during the colonial period, these several droits of the admiralty were not prize to the captors, because the king's several grants to the takers of prizes made in each war as the occasion arose, and were subsequent in date to the general grant to the lord high admiral. So that the English cases are very numerous in which prizes are condemned to the admiral, or, in later times, to the king in his office of lord high admiral, and not to the captors. It may well be conceded that *the United States have succeeded to the rights in prize, both of the crown and of the lord high admiral,* and that Congress has the right to grant prize-money to whomsoever it pleases, without regard to these ancient distinctions. Still, in construing the prize acts, it is useful to recollect that by the English law the grants of prize-money had their well understood limitations, and that a condemnation in prize was not necessarily a condemnation to captors; and that there were prizes which were not granted to either the admiral or the captors, such as vessels voluntarily brought in on revolt by their own crews, and vessels seized in port before declaration of hostilities; so that there were three different kinds of condemnation,—to the king, to the admiral, and to the captors. I have no doubt that some of the same distinctions and limitations hold

good in this country today. *Whatever is prize of war by international law in the several countries which acknowledge that law is so here, and our prize acts do not undertake to limit or define the boundaries of prize or of prize jurisdiction.* Accordingly, I have held, in a case of cotton picked up at sea, that it was properly proceeded against as prize, and I have no doubt of the propriety of that decision. Seventy-eight Bales of Cotton (Case No. 12,679). It necessarily follows that there may be prize when there is no one who is a captor under this prize act. Thus, if a person or a vessel having no existing commission makes a prize, the condemnation goes to the United States. *The Dos Hermanos,* 10 Wheat. (23 U. S) 306. So if there be no captor at all, as of vessels voluntarily brought into port of their own crews, or driven in by stress of weather. The old grant of droits of the admiralty was of prizes of this character, but it did not include all of this kind; the distinction, therefore, is older than the grant of droits, and the principle remains good in our law, that there may be seizers or takers in a certain sense who are not entitled to prize-money as technical captors, *though the goods seized may be prize.*

Upon the best consideration I have been able to give the subject, my opinion is that the *Gladiolus* was not the captor of this prize within the true intent of our statute, nor was the fleet as a whole."

In affirming Judge Lowell's decision, the Supreme Court of the United States, in 13 Wall. 339, 393, said:

"The course pursued (by Judge Lowell) was eminently proper under the circumstances, and

according to the course of practice in proceedings in prize."

In *Oakes* v. *U. S.*, 174 U. S. 778, 786, 788, the Supreme Court (Gray) (at p. 782), said:

"While she (the *Eastport*) was lying under the bank of the Tennessee River near Cerro Gordo, and being converted into a gunboat for use in the Confederate service * * * was boarded under the fire of the enemy and captured by detachments of men from the United States gunboats.

By the law of nations, as recognized and administered in this country, when movable property in the hands of the enemy, used, or intended to be used, for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, *a judicial decree of condemnation is usually necessary to complete the title of the captors.* 1 Kent Com. 102, 110; Halleck's International Law, c. 19, sec. 7; c. 30, sec. 4; *Kirk* v. *Lynd*, 106 U. S. 315, 317.

The Eastport, at the time of her capture by the forces of the United States, was in the hands of the Confederate forces, and was being transformed into a gunboat. * * * Although not yet in condition for hostile use, she was clearly intended for that use."

In *The Nassau*, 4 Wall (71 U. S.) 634, 640-642, Mr. Justice Davis, delivering the opinion of the Court, said:

"It is the practice with civilized nations, when a vessel is captured at sea as a prize of war, to bring her into some convenient port of the govern-

ment of the captor for adjudication. *The title is not transferred by the mere fact of capture,* but it is the duty of the captor to send his prize home, in order that a judicial inquiry may be instituted to determine whether the capture was lawful, and if so, to settle all intervening claims of property. Until there is a sentence of condemnation or restitution, the capture is held by the government in trust for those who, by the decree of the Court, may have the ultimate right to it.

But it is argued that the libel in this case was sustainable, because no libel in prize had been filed, and until this was done any one had the right to proceed against the vessel for a meritorious claim. If this were so, it would greatly lessen, with captors, the stimulus to activity so necessary in time of war, for they could never tell how many private actions they would have to defend before they could reap the fruits of their enterprise and valor. Sound policy, as well as the law of prize, therefore, requires that all demands against captured property must be adjusted in a prize court, and that the property arrested as prize shall not be attachable at the suit of private parties. If such parties have claims which, in their view, override the rights of captors, they must present them to the prize court for settlement.

The fact of capture determines the jurisdiction, and not the filing of a libel. When captured as prize of war the property is in the custody of the law, and remains there to await the decision of a prize court, and, if condemned, all claims to the property are by it adjusted. Any other rule would work great hardship to captors, and tend to cripple the operations of government during

time of war. Under the provisions of the Act of Congress for the better administration of the law of prize, it is directed that, whenever any property captured as a prize is brought into any district of the United States for adjudication, it shall be the duty of the prize commissioners to receive it and keep it, until by the proper process of the Court, it shall be placed in the custody of the marshal of the district.

When, therefore, in this case, the prize commissioners certified to the Court below that the prize steamer *Nassau* had arrived in the District of New York and was delivered into their hands, there was sufficient evidence before the Court that the vessel was claimed as prize of war, and in the jurisdiction of a prize court; and the motion to dismiss this libel, filed by private parties, was properly entertained and decided.

Whether a maritime lien, like the one in this case, is lost, when the property is captured *jure belli*, would have been a proper question for investigation and decision by the prize court that condemned the *Nassau*, and which the libellants, on presentation to the tribunal, could have had decided.

Not having done so, the question is not before this Court for review."

The remarks of the Court in *The Nassau*, respecting claims of third persons, refer to claims arising before capture. It is well settled, both here and in England, that such claims are wiped out by capture unless, in the discretion of the Court, justice requires that they be admitted (*The Nyanza*, 276 Fed. 415). The claims of the present libellants, however, arose after capture, and

are, in all respects, similar to the claim which was allowed by the Supreme Court in *The Siren*, 7 Wallace 152.

This is not only a rule of international law, but a principle confirmed by the Constitution of the United States. In *Jecker* v. *Montgomery*, 13 How. 498, it appeared that a vessel captured by naval forces for blockade running during the Mexican War, was brought into the occupied port of Monterey, and there, together with her cargo, "condemned as prize" by the chaplain of one of the war vessels, whom the American military commander, with the President's approval, had appointed "Alcalde of Monterey," and authorized to exercise admiralty jurisdiction in cases of capture. More than a year later claimants of the cargo filed a libel *in personam* against the captor, attacking the validity of the Monterey decree. A demurrer to the libel was overruled by the Circuit Court, and on appeal to the Supreme Court, the decision was affirmed. Chief Justice Taney, delivering the opinion of the Court, said (p. 515):

> "All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And *under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish.* Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws

of the United States. And *neither the President nor any military officer can establish a court* in a conquered country, and authorize it *to decide upon the rights of the United States,* or of individuals *in prize cases, nor to administer the laws of nations.*

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the Court at Monterey is a nullity, and can have no effect upon the rights of any party."

In *The Resolution*, 2 Dallas (U. S.), 1, 2, 3, 4, 5, the Supreme Court said:

"Not an instance has been produced, where a capture, not authorized by the rights of war, has been held to change the property; but many authorities have been brought to show, that no change is effected by such capture. To say, that a capture, which is out of the sanction and protection of the rights of war, can nevertheless derive a validity from the rights of war, is surely a contradiction in terms.

But it is said, 'the fact cannot be ascertained, that the capture in this case was not authorized

by the rights of war; for it depends upon the will of the sovereign, whether an outrage, and capture *supra altum mare*, by his subjects of the property of subjects of another nation, shall be an illegal and piratical act, or an act of hostility; that the sovereign is not obliged to promulgate his will, at the moment he makes war, and that as the human will has no physical exsitence, it cannot be ascertained, but by a declaration of it by the sovereign himself, and therefore, *non constat*, but that the capture in the present case, was authorized by the British Crown and so a fair act of hostility, authorized by the rights of war.'

This argument is ingenious and plausible but not solid.

But, suppose, the term prize merely imported a capture, without any reference to its legality, and that it was the spirit and intention of the ordinance, to subject to prize all captures, both legal and illegal, after twenty-four hours; it does not follow, that it would affect the present case. *The municipal laws of a country cannot change the law of nations*, so as to bind the subjects of another nation.

The legality of a capture is open for question and examination, until a competent jurisdiction has decided the question, and a decree passes for condemnation as prize: then, and not before, all further questions and examinations are precluded; then, all parties, and all foreign courts, are estopped to say 'the capture is not legal'; and if the decree be erroneous or iniquitous, the party injured must apply for redress to that nation, whose courts have committed the error or iniquity."

In *Young* v. *United States*, 97 U. S. 39, 60, the Supreme Court said:

> "The rightful capture of movable property on land transfers the title to the government of the captor as soon as the capture is complete, and it is complete when reduced to 'firm possession.' There is no necessity for judicial condemnation. In this respect, captures on land differ from those on sea."

The necessity after seizure of a deposit of value or a judicial condemnation, as a condition to the taking over by the Executive of an enemy vessel for military purposes is still more evident on consideration of the decisions of the Supreme Court of the United States holding that vessels such as the *Neckar* are entitled to most liberal treatment and that a non-combatant enemy has a right not only to a judicial hearing and to appear and claim the seized vessel and contest the seizor's claims, but also to prosecute an appeal to the Supreme Court if the lower court's ruling should be unfavorable.

See *The Pedro*, 175 U. S. 354 (quoted at p. 76 of this brief).

The "day in court" required by international law was also given in *The Guido*, 175 U. S. 383 (1899), where the Supreme Court said:

> "She was there (at Key West) libelled and proofs *in preparatio* were taken. The master appeared on behalf of the owner (a Spanish corporation) and asserted claim to the vessel, and moved for leave to take further proofs in respect

of matters set forth in his test affidavit therewith filed, which motion was denied."

The same "day in court" was also given in *The Buena Ventura*, 175 U. S. 384, where it was said (at p. 385):

> "The vessel * * * was condemned upon the answers, given by the master and mate of the steamship, to standing interrogatories *in praeparatio*, and upon the documents seized on board the ship by the captors. * * *
>
> She made no resistance at the time of her capture, there were no naval or military officers on board of her, and she carried no arms or munitions of war. * * * In the test affidavit of the master he swore that at all times before the ship's seizure he and all of his officers were ignorant that war existed between Spain and the United States, and the vessel at the time of her capture was following the ordinary course of her voyage. * * * After a hearing the District Court on the 27th of May, 1898, condemned the vessel, 87 Fed. Rep. 927, which was sold under the final decree of the court, and her proceeds deposited to abide the event of an appeal, which was taken on the part of the claimant."

The Supreme Court said (at pp. 387 and 388):

> "She (the *Buena Ventura*) was captured as lawful prize of war, of the existence of which, up to the moment of capture, all her officers were ignorant. She was not violating any blockade, carried neither contraband of war nor any officer in the military or naval service of the enemy, nor any dispatch of or to the Spanish Government and attempted no resistance when captured.

> *The facts regarding this vessel place her within that class which this Government has always desired to treat with great liberality.* It is, as we think, historically accurate to say that the Government has always been, in its views, among the most advanced of the Governments of the world in favor of mitigating, as to all non-combatants, the hardships and horrors of war. To accomplish that object it has always advocated those rules which would in most cases do away with the right to capture the private property of an enemy on the high seas. 3 Wharton's International Law Digest, sec. 342. The refusal of this Government to agree to the Declaration of Paris was founded in part upon the refusal of the other Governments to agree to the proposition exempting private property, not contraband, from capture upon the sea."

Speaking in that case of the Executive Proclamation issued at the outbreak of war regarding enemy merchant vessels, the Supreme Court said (at p. 388):

> "It is necessary when his proclamation has been issued which lays down rules for treatment of merchant vessels, to put upon the words therein used the most liberal and extensive interpretation of which they are capable."

The same "day in court" to the private enemy owner was granted in *The Panama*, 176 U. S. 535. In that case, the seized vessel was owned by an enemy corporation. The Supreme Court said (at p. 536):

> "This was a libel for the condemnation of the steamship *Panama* as prize of war, and was heard in the District Court upon the libel, the

claim of the master in behalf of the owner of the vessel, and the depositions *in preparatio* of her master, her super-cargo and her chief engineer, which showed * * * She had no military or naval officer on board, made no resistance to the capture, and delivered all her papers and mails to the prize master. There were mounted on board the *Panama*, at the time of her capture, five guns. * * *

The master of the *Panama* moved the Court to allow further proof. * * * The District Court denied the motion of the master to take further proof * * * and extend a final decree of condemnation. * * * The Court also, on the application of the commodore commanding at Key West, and on the recommendation of the prize commissioners, ordered all the mounted guns and the ammunition therefor to be appraised by two officers of the Navy, and delivered to the commodore for the use of the Navy Department. The master of the *Panama* appealed to this Court from the decree condemning the vessel. * * *

That case (the *Buena Ventura*) would be decisive of this one, but for the mails and the arms carried by the *Panama*."

Because of the guns on the *Panama* the Court believed that she would be "employed as an auxiliary cruiser of the enemy's navy, in the war with this country" and therefore affirmed the decree of condemnation.

The same right of appeal by the enemy owner was recognized in *The Paquete Habana*, 175 U. S. 677.

That the general prize law requires a judicial hearing of the enemy owner, or of the master as his agent

and claimant, as a condition to the transfer by a prize court to the seizing sovereign of lawful possession for military use, is also shown by the following decisions:

The Thalia, 2 Rus. & Jap. P. C. 116;
The Lesnik, 2 R. & J. P. C. 92;
The Ekaterinoslav, 2 R. & J. P. C. 1;
The Mukden, 2 R. & J. P. C. 12;
The Kotik, 2 R. & J. P. C. 96;
The Ord, 2 R. & J. P. C. 354;
The Rossia, 2 R. & J. P. C. 39;
The Argun, 2 R. & J. P. C. 42;
The Manchuria, 2 R. & J. P. C. 52, and
The Tátarles, 1 R. & J. P. C. 166.

Indeed, the rule of law requiring a judicial proceeding as a condition to the transfer of possession to the soverign, is so well settled that the Navy Department has recognized it by general orders.

In *The Santo Domingo*, 119 Fed. 388 (E. D. N. Y.), the Court quotes Section 24 of General Order No. 492 of the Navy Department of the United States as follows:

> "24. The title to property seized as prize changes only by the decision rendered by the prize court. But, if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court."

The Court then says (at p. 389):

> "This order is intended to interpret the statutes for the guidance of the captors. It provides

for four alternatives: (1) sending the prize to the nearest home port; (2) converting it to public use in the case of need; (3) selling it if it may not be sent in for reasons indicated (unseaworthiness, existence of infectious disease, or lack of prize crew); (4) destroying it if it cannot be sold or there be imminent danger of recapture. One of the courses the captor must adopt."

And the Court holds (at p. 390) that

"The destruction of a lawful prize at the instance of the commander of the captors, by reason of the imminent danger of recapture, is not such an appropriation of the property for the use of the government as constrains the United States to deposit the value thereof for distribution, and entitles the captors to share therein.

This conclusion is based on the following findings:

(1) The statute contemplates that the captured property, or the proceeds, if sold, shall be brought to the proper port, unless it be destroyed or appropriated to the use of the Government before such delivery, and in case of appropriation before or after delivery, the value of the property shall be deposited by the Government for disposition. Adjudication as to the legality of the capture and award of prize money in a proper case are required when the vessel is brought in, sold, or appropriated, but adjudication only as to lawful prize as distinguished from award of bounty money when the property has been destroyed."

In 188 U. S., at pages 259 and 263, are quoted sections 23 and 24 of the "Instructions to Blockading Vessels and Cruisers," issued by General Order of the Secretary of the Navy on June 20, 1898:

> "23. As to the delivery of the prize to the judicial authority, consult sections 4615, 4616 and 4617, Revised Statutes of 1878 (Exhibit B). The papers, including the log book of the prize, are deliverable to the prize commissioners; the witnesses; and the prize itself remains in the custody of the prize master until the Court issues process directing one of its own officers to take charge.
>
> 24. The title to property seized as prize changes only by the decision rendered by the prize court. But, if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court."

If it should be suggested that the law of maritime or prize seizure is confined to seizures on the high seas, such suggestion is refuted not only by the British authorities above quoted, but also by the following American cases:

In *The Joseph*, 8 Cranch, 451, 455, the Supreme Court said:

> "Another objection relied upon is that this vessel was captured within the territorial limits of the United States. The fact upon which this objection is raised is not clearly established one way or the other. But admit it to be as contended

for by the claimants, the law is nevertheless against them. * * * *All captures as prize of war may lawfully be made within the territorial limits of the United States at any place below low water mark.* In admiralty; 14 Court of Claims 48."

In *The Caledonian*, 4 Wheaton (17 U. S.), Mr. Justice Story, delivering the opinion of the Supreme Court, said (at pp. 100-103):

"This is the case of an American ship, which sailed from Charleston, South Carolina, with a cargo of rice, bound to Lisbon, about the 28th of May, 1813, under the protection of a British license. In the course of the voyage, the ship was captured by a British frigate, and sent into Bermuda for adjudication. Upon trial, she was acquitted, and her cargo being prohibited from exportation, was afterwards sold by the agent of the claimant at Bermuda, and the proceeds were remitted for his use. The ship sailed from Bermuda for the United States, in November, 1813, and upon her arrival *at Newport, in Rhode Island, was seized by the collector of that port*, as forfeited to the United States. The libel contains four articles propounding the clauses of forfeiture: first, for the ship's having on board and using a British license; secondly, for the ship's being engaged in trade with the enemy; and, thirdly and fourthly, for using a British license, contrary to the act of congress of the 2nd of August, 1813, ch. 56, prohibiting the use of British licenses.

It is unnecessary to consider the last two articles, which are founded upon statute of prohibitions, because it is clear, that the two preceding articles, founded on the general law of

prize, *are sufficient to justify a condemnation jure belli,* the proof of the facts being most clearly established.

The only questions which can arise in the case, are, whether the ship was liable to seizure for the asserted forfeiture, *after her arrival in port;* and, if so, *whether the collector had authority to make the seizure. And we are clearly of opinion, in favor of the United States, on both points. It is not necessary, to enable the government to enforce condemnation in this case, that there should be a capture on the high seas.* By the general law of war, every American ship, sailing under the pass or license of the enemy, or trading with the enemy, is deemed to be an enemy's ship, and forfeited as prize. If captured on the high seas, by a commissioned vessel, the property may be condemned to the captors, as enemy's property; if captured by an uncommissioned ship, the capture is still valid, and the property must be condemned to the United States. But the right of the government to the forfeiture, is not founded on the capture; it arises from its general authority to seize all enemies' property, coming into our ports, during war; and also from its authority to enforce a foreiture against its own citizens, whenever the property comes within its reach. If, indeed, the mere arrival in port would purge away the forfeiture, it would afford the utmost impunity to persons engaged in illegal traffic, during war, for in most instances, the government would have no means of ascertaining the offense, until after such arrival.

In respect to the other point, it is a general rule, that any person may seize any property for-

> feited to the use of the government, either by the municipal law, or by the law of prize, for the purpose of enforcing the forfeiture. And it depends upon the government itself, whether it will act upon the seizure. If it adopts the acts of the party, and proceeds to enforce the forfeiture by legal process, this is a sufficient recognition and confirmation of the seizure, and is of equal validity in law, with an original authority given to the party to make the seizure. The confirmation acts retroactively, and is equivalent to a command."

Such suggestion that a prize seizure must be made on the high seas is also refuted by the following cases, which deal with seizures in enemy ports:

In *Dewey* v. *United States,* 178 U. S. 510, seizures of enemy public vessels (Spanish men-of-war) in Manila Bay (enemy territory) were held proper and prize money awarded.

In *The Santo Domingo,* 119 Fed. 386 (E. D. N. Y.), a Spanish armed vessel was seized as prize "while stranded on the cost of Cuba."

In *United States* v. *Steever,* 113 U. S. 747, a seizure of an enemy public vessel (the rebel iron-clad *Albemarle* "at Plymouth in the Roanoke River in the State of North Corolina," was held proper and prize money awarded.

At page 753, the Court said:

> "Prize money is, strictly speaking, a matter of bounty and not of right, and no one has any absolute title to it before adjudication."

A typical case showing the judicial method the President should have followed in "taking over" possession of *The Neckar* for military use is outlined in *The Pedro*, 175 U. S. 354. There an enemy merchant vessel was seized and a libel filed against her for condemnation as prize. At pages 361 and 362 it is said:

> "In due course proofs *in preparatio*, which embraced the ship's papers and the depositions of her master and first officer, were taken. The master appeared in behalf of the owners and made claim to the vessel, and moved the Court for leave to take further proofs. * * *
>
> The motion was denied, the cause heard on the pleadings and proofs *in preparatio*, and a decree of condemnation entered. Subsequently the Secretary of the Navy elected to take the vessel for the use of the United States pursuant to section 4624 of the Revised Statutes. By order of Court she was duly appraised and delivered to the Navy Department, and the amount of her appraised value deposited with the Assistant Treasurer of the United States at New York, subject to the order of the District Court. From the decree of condemnation an appeal was prosecuted to this Court."

The procedure that should have been followed by the Executive in the case at bar is also indicated in *The Rita*, 89 Fed. 763 (Dist. So. Car. 1898), where the Court said:

> "The Spanish steamship *Rita*, heretofore condemned as lawful prize of war, was taken for the use of the government, after appraisement, in accordance with Section 4624 of the Revised Stat-

> utes, and the value thereof, $125,000 is subject to the order of the Court in this cause * * * The proof shows that the *Rita* was an unarmed merchant vessel."

This is not only a rule of international law, but a principle confirmed by the Constitution of the United States. In *Jecker* v. *Montgomery*, 13 How. 498, it appeared that a vessel captured by naval forces for blockade running during the Mexican War, was brought into the occupied port of Monterey, and there, together with his cargo, "condemned as prize" by the chaplain of one of the war vessels, whom the American military commander, with the President's approval, had appointed "Alcalde of Monterey," and authorized to exercise admiralty jurisdiction in cases of capture. More than a year later claimants of the cargo filed a libel *in personam* against the captor, attacking the validity of the Monterey decree. A demurrer to the libel was overruled by the Circuit Court, and on appeal to the Supreme Court, the decision was affirmed. Chief Justice Taney, delivering the opinion of the court, said (p. 515):

> "All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority

from the Constitution or the laws of the United States. And *neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States,* or of individuals in prize cases, nor to administer the laws of nations.

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party."

Lord Stowell put the matter forcibly in *The Flad Oyen,* 1 C. Rob. 114, where a British vessel captured by a French privateer was condemned as prize by a French consul at Bergen:

"It has frequently been said that it is the peculiar doctrine of the law of England to require a sentence of condemnation, as necessary to transfer the property of prize; and that according to the practice of some nations twenty-four hours, and according to the practice of others, bringing *infra presidia,* is authority to convert the prize. I take that to be not quite correct; for I apprehend that by the general practice of the law of nations, a

sentence of condemnation is at present deemed generally necessary; and that a neutral purchaser in Europe during war, does look to the legal sentence of condemnation as one of the title deeds of the ship, if he buys a prize vessel."

And he concludes:

"It is my duty not to admit, that because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution; merely because general theory might give it a degree of countenance, independent of all practice from the earliest history of mankind. The institution must confrom to the text law, and likewise to the constant usage upon the matter, and when I am told that before the present war, no sentence of this kind has ever been produced in the annals of mankind; and that it is produced by one nation only in this war; I require nothing more to satisfy me that it is the duty of this court to reject such a sentence as inadmissible."

In Moore's Digest, International Law, Vol. VII, p. 630, it is said:

"The capture of the property having been made on the high seas, and no prize court having inquired into the authority of the captor, or the liability of the property under the public law to be seized, that act might in strictness be regarded as piratical in its character. By the maritime law of nations universally and immemorially received, there is an established method of determination,

whether the capture be or be not lawful prize. Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation had thereon as prize in a court of admiralty, judging by the law of nations and treaties."

TENTH POINT.

The Resolution is unconstitutional because it reduces the extent of the constitutional grant of admiralty jurisdiction to the judiciary and impairs the substantive international maritime law.

1. If construed as the United States Attorney suggests, the Resolution legislates against enemy-owned vessels as a class in an attempt to exempt them from the ordinary liabilities of privately owned vessels even though Congress intended not to assert any property right in them but merely to act as operating receiver for the enemy owners. By attempting to oust the admiralty courts of jurisdiction over a great multitude of vessels already within the admiralty jurisdiction, it reduces the extent of the admiralty jurisdiction which was granted to the courts by the Constitution, and which cannot be reduced by Congressional action. As stated by Professor Thomas Reed Powell in the Michigan Law Review, Volume 20, page 477, "The fundamental Constitution in 1920-1921," this point has been overlooked by this Court in its recent decisions relating to the immunity of public vessels.

2. The Resolution impairs the substantive in-

> ternational maritime law and tends to the destruction of life and property on navigable waters, by creating a fleet of irresponsible vessels and by declaring that the failure of the large number of interned vessels already in the admiralty jurisdiction to observe the centuries-old collision rules of the admiralty law shall not subject such vessels to the ordinary liabilities of the maritime law. These collision rules are economically and equitably necessary, and are designed to protect lives and property on navigable waters."

In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 161, Mr. Justice McReynolds, delivering the opinion of this Court, said:

> "The Constitution itself adopted the rules concerning rights and liabilities applicable therein, and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is quite impossible to account for the multitude of adjudications by the admiralty courts."

The mere fact that the master of the *Antigone* was appointed by an officer of the United States, Frank H. Phipps, did not make the master himself an officer of the United States or *ipso facto* entitle his vessel to immunity from obeying the ordinary collision rules and the process of the admiralty courts.

In *Gableman* v. *Peoria Ry. Co.*, 179 U. S. 335, 338, 339, 340, this Court said:

> "The receiver rested his contention that the case arose under the Constitution and laws of the

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United States on the single ground of his appointment by the Federal Court.* * * Nor are the cases against United States officers as such, or on bonds given under acts of Congress, or involving interference with Federal process, or the due faith and credit to be accorded judgments, in point. The question is whether the bare fact that the appointment of this receiver was by a Federal Court makes all actions against him cases arising under the Constitution or laws of the United States. * * * In *Bausman* v. *Dixon* we ruled that a judgment against a receiver appointed by a Circuit Court of the United States, rendered in due course in a state court, does not involve the denial of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. That was an action to recover for injuries sustained by reason of the receiver's negligence in operating a railroad company chartered by the State of Washington, though the receiver was the officer of the Circuit Court, and we said: 'It is true that the receiver was an officer of the Circuit Court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state Supreme Court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the Circuit Court appointing a receiver did not create a Federal ques-

tion under section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order.' And although that was the case of a writ of error to a state court, we applied the reasoning in *Pope* v. *Louisville &c. Railway Company* in which the right of appeal to this court from the Circuit Court of Appeals was asserted on the ground that the case arose under the Constitution and laws of the United States, because Pope was a receiver of a Federal Court. We decided that the suit was ancillary to the original cases in which the receiver was appointed, and that the jurisdiction was dependent on the ground of jurisdiction in those cases, and we also held that the receiver's orders of appointment were not equivalent to laws of the United States in the meaning of the Constitution, and that the mere order of a Federal Court, sitting in chancery, appointing a receiver, did not in itself form adequate ground of jurisdiction."

In *Walters* v. *Payne*, 292 Fed. 124, 127, the United States Circuit Court of Appeals for the Third Circuit, said:

> "The action does not arise under the laws of the United States, because the President under a law of the United States appointed the agent against whom the common-law action might be litigated in the proper court. *Gableman* v. *Peoria, Decatur & Evansville Railway Co.*, 179 U. S. 335."

ELEVENTH POINT.

By granting immunity in the present case this Court would be extending the theory of immunity beyond any of its existing decisions.

The furthest extent to which this Court has stretched the theory of immunity was in its decision in the *Western Maid*, 257 U. S. 419.

But in that case the Government admittedly had either full legal title to the vessels or owned them *pro hac vice* under a demise or lease under which the United States assumed all marine and war risks and the special obligation of returning the vessels at the end of the war, free from collision liens and physical injuries together with full agreed compensation for their war use (See *Requisition Bare Boat Charters, Record, Western Maid* case).

Moreover, each of the vessels in that case had a written commission or certificate from the President or a Cabinet Officer or the Bureau of Navigation.

Furthermore, the *Western Maid* and the *Liberty* were manned by commissioned officers and enlisted crews of the United States Navy "and the *Carolinian* had been assigned to the War Department of the United States and was employed by it as an Army transport, being manned by an Army crew furnished by the War Department" (Brief of District Judge Rose in this Court with reference to the *Carolinian*, p. 6).

As to the *Carolinian* the United States agreed to assume war and marine risks "including all risk of liability for damage occasioned to other vessels, persons or property" (Government's petition in *Carolinian* case, p. 32).

The title of the United States to the vessels in the *Western Maid* case was therefore both undisputed and shown by the evidence.

The fact having been established that the vessels were owned by the sovereign the question then arose whether they were employed as merchant vessels.

But this latter question does not arise in the present case, because the Government has not yet proved the condition precedent that it had confiscated or promised to pay for a property interest in the *Antigone*. If the Government did not have a property interest at the time of the collision it had at that time no interest in any recovery by the libellants other than as custodian or receiver. This interest was insufficient to exempt the vessel from obeying, and being subject to liens for violation of, the ordinary admiralty collision rules.

Should the Court in the present case further expand the theory of immunity? Will the Court prefer an abstract theory of sovereign immunity which, in a republic apparently has no practical or equitable significance, and which has no historical place in the international admiralty law, to the practical social necessity of subjecting to effective control by fixed and enforceable collision rules vessels which are navigating in our harbors and on the seas and which are endangering lives and property on other vessels?

In the Harvard Law Review, Vol. 34, page 165, it is said:

> "It is in accord with the spirit of the times to assert the justice and expediency of general state liability for torts (32 Harv. L. Rev. 447; 30 Harv. L. Rev. 20; 19 Col. L. Rev. 467). A tendency of the several states to assume liability for torts in

certain instances can be noted (30 Harv. L. Rev. 25; 32 Harv. L. Rev. 447; 30 Harv. L. Rev. 20; 19 Col. L. Rev. 467). The United States has recently assumed liability in several matters of a tortious nature. The holder of a patent is protected against infringement by a servant of the government (Act of June 25, 1910, 36 Stat. at L. 851. See *Cramp & Sons* v. *International Co.*, 246 U. S. 28 (1918)). A Workmen's Compensation Act (U. S. Comp. Stat. 1916, §8932) protects federal employees. Persons injured by government operation of the railroads have the same remedy as before (Act of March 21, 1918, 40 Stat. at L. 456, §10. See *Dahn* v. *McAdoo*, 256 Fed. 549 (1919)). Vessels of the Shipping Board leased or chartered to private operators and used as merchant ships may be libeled in event of liability incurred in operation just as a privately owned vessel (39 Stat. at L. 529, §9. See *The Lake Monroe*, 250 U. S. 246 (1919); *The Florence H.*, 248 Fed. 1012 (1918)). Congress has even directed the War and Navy Departments to adjudicate claims for property damages done by training operations including use of airships (Act of July 11, 1919, chaps. 8, 9), and *to compensate for damages done by the expeditionary forces in allied countries in accordance with the law of those countries* (Act of April 18, 1918, 40 Stat. at L. 532)." (Italics ours.)

In "Responsibility of the State in England," by Harold J. Laski, 32 Harvard Law Review, 447, 453, it is said:

"Government must pay where it wrongs. There are no arguments against it save, on the one hand,

> the dangerous thesis that the state-organs are above the law, and on the other, the tendency to believe that ancient dogma must, from its mere antiquity, coincide with modern need."

With the greatest respect, we submit that the theory of immunity applied by this Court in the *Western Maid* case, has been quite generally criticised as unsound, inequitable, and impracticable, and as opposed to the practice of the admiralty courts of other nations.

It tends, moreover, to the destruction of life and property on navigable waters by creating a great fleet of irresponsible vessels which have no obligation to observe the centuries-old collision rules of the admiralty law, whose purpose is to protect life and property at sea.

The theory applied to a case like the present would seem, moreover, to be constitutionally and philosophically unsound. It appears to be based on the doctrines of the Austinians and Nominalists, rather than on the modern and practically significant philosophy of the Pragmatists and Realists. The latter would seem to be characteristically the philosophy of the Constitution and the sovereign which should be adopted by an American court. Paul Vinogradoff, Common Sense in Law, pages 34 and 207; Edward Jenks, State and Nation, page 208; James T. Young, New American Government, page 276; Joseph Story on the Constitution, page 197.

Social utility, the adoption of the legal rule tending to safety of life and to uniformity of observance of reasonable collision rules, would seem to be preferable to theorizing on the Monistic and absolute nature of an Austinian State and its immunity from "commands" and "power."

Benjamin N. Cardozo, The Growth of the Law (1924), page 117;

Harold J. Laski, Foundations of Sovereignty,

Roscoe Pound, Spirit of the Common Law, pp. 83-84;

Harold J. Laski, Foundations of Sovereignty, pp. 126; 109;

Frederic J. Stimson, Popular Law Making, p. 10;

James C. Carter, Law, Its Origin, Growth and Function, pp. 6, 8; 13-14;

John Chipman Gray, Nature and Sources of Law, 1921 ed., pp. 74, 233, 288;

John W. Salmond, Jurisprudence, pp. 202-203;

J. M. Lightwood, Nature of Positive Law, p. 417;

Paul Vinogradoff, Outlines of Historical Jurisprudence, p. 86;

James Bryce, Studies in History and Jurisprudence, p. 538;

Jethro Brown, Austinian Theory of Law, p. 194.

In "Pound's Juristic Philosophy," 18 Illinois Law Review, it is said (p. 294):

> "While we may study law in its logical aspects we should by no means identify law with logic, any more than we should identify it with religion, politics, or morals. *Identify it with the authority of kings and it begins to be capricious,* arbitrary, and oppressive; * * * and finally, identify it with logic and it soon degenerates into a mechanical rule invested with mysterious technicality."

And at page 295:

> "The 'jurisprudence of conceptions' is based on the unenlightened belief that whatever is logically consistent should necessarily be a rule of life, and that a definition implies the duty of enforcing it * * * A good logician would never mix up questions of logic with the problems of life."

And at page 298:

> "For Pound, as for Jhering, the ultimate sanction of a right lies, not in the right itself, but in the social demand for its enforcement * * *. The thing which we have constantly to bear in mind is that it is one of the principal functions of law to safeguard the general public against all arbitrary and oppressive acts on the part of those who may happen in a given time and place to possess the power to oppress or otherwise wrong or exploit their fellowmen. The power is not necessarily political in nature * * * All sorts of power are subject to abuses and it is the function of law to prevent arbitrariness in the exercise of any power."

In an article entitled "Admiralty Jurisdiction of Late Years" in the Harvard Law Review, March, 1924, Volume 37, page 528, 541, Charles Merrill Hough, United States Circuit Judge at New York, wrote as follows:

> "It is the safest of assertions that the mainspring of effective admiralty power is the maritime lien. The American concept of that *jus in re*, as a proprietary interest in an offending *res* arising contemporaneously with the cause of ac-

tion, is elementary learning, resting on the authority of classical decisions of the Supreme Court. In the whole maritime anthology of that Court, no single flower is so important. Not only does the lien arise with the cause of action, but the right to enforce it sometimes is the cause of action. Of this, *The China* is the perfect instance.

The conservatism manifested in respect to liens for making, repairing, and supplying vessels was suddenly and, indeed, violently abandoned in *The Western Maid,* which held that no lien for collision ever arose against vessels owned (absolutely or *pro hac vice*) by the United States; wherefore, when government ownership and possession ceased, the persons injured were no better off than they were before.

The admiralty has suffered no more than other jurisdictions from the chronic dislike of sovereigns (however democratic) to pay for wrongs done; and the proposition that if you could not sue the sovereignty you could not seize its property or disturb its possession thereof followed as of course. But the sacred lien, it was believed, existed; because if *The China* (and its like) announced the law, the personified ship was affected with a proprietary interest capable of fruitful enforcement as soon as the sovereign's protecting hand was removed. Furthermore, this belief had been supported by two decisions, which quite possibly did not require the reasoning used, but which, as decided, were flat to the effect that, in respect of a vessel belonging to the United States, 'inability to enforce a claim is not inconsistent with its existence' for the existence 'even of a lien is not always dependent upon the ability of the holder to enforce it by legal proceedings';

and further that 'a lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control.' These propositions were held over the dissent of Nelson, *J.*, who asserted that 'if the owner of the offending vessel is not liable at all for the collision—it follows there can be no lien'—a singular contention to be made when the ink was hardly dry on *The China* opinion. In short, although the same result might have been reached in another way, *The Siren* held that the reason why the collision claimant prevailed was that he had a lien which the Court would compel the United States to recognize when it needed the services of a judicial tribunal to condemn the offending ship as prize.

This was a logical application of the *jus in re* doctrine so carefully nursed by the Court, and served even governments well enough until the United States, for the first time in its history, had two large merchant fleets, one of chartered vessels which it had contractually engaged to redeliver to owners free and clear of obligations, and one of owned vessels which it wished to sell to purchasers, who insisted on a guaranty of freedom from liens.

What was wanted was freedom from contractual obligations, and this result it reached by successfully maintaining, in *The Western Maid*, that 'the law merchant personified the commercial ship, not a public ship,' thereby inducing the Court posthumously to follow Justice Nelson in part.

But mere acquiescence in the Solicitor General's proposition would not do, and Holmes, *J.*, for the Court announced one piece of law which goes far beyond the necessities of this admiralty

question, as to which no one could deny that the Court could always do what it had done before and discard *The Siren* as coolly as it once did the limitation of jurisdiction by the ebb and flow of the tide.

That single controlling proposition is that 'the United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort.' When it comes to hurdling a legal difficulty Holmes, *J.*, is *hors concours*, but in this effort has has surpassed himself.

The differentiating of *The Siren* and the silence maintained as to *The China* in the opinion are fully treated in the dissents, McKenna, *J.*, demonstrating that the Court has followed the dissent in the first decision and said nothing about the second because there really was nothing to say.

But the harm to the tradition of admiralty is not in the lip-service to previous decisions which this opinion renders worthless, but in the tone of mockery displayed in every reference to the doctrine of a lien attaching regardless of the shipowner's personal liability. 'Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp'—which asserts that Justice Field saw ghosts in *The Siren*. That a ship for purposes of lien may be regarded as a person 'is a fiction not a fact, and as a fiction it is a creation of the law'; therefore, by suggestion, it is unworthy of consideration—a thought rather staggering when one remembers the part that fictional venue in transitory actions has played in law development. But also 'it is totally immaterial that in dealing with private

wrongs the fiction, however originated, is in force,' for 'there is no mystic over-law to which even the United States must bow—therefore, away with the fiction when the government is concerned. All these quotations are not vital to the main proposition and it remains true that, when the hurdler has jumped, the obstacle remains. So liens remain but so bespattered by language that the traditionalist remembers the old song:

> 'It ain't so much as wot 'e said,
> As the narsty w'y 'e said it.'

The holding which disposed of the case may be put thus: if there is no right to sue for tort, there is no tort. This is not a maritime question at all; but it disposes of an admiralty cause by refining on the meaning of a word unknown to the historic admiralty, though it is unquestionably naturalized in America. The word that is known to admiralty is collision; so that perhaps, in defiance of syllogistic canons, the bar will state the rule in *The Western Maid* thus: 'The United States has not consented to be sued for collisions; therefore, in a legal sense, there was no collision.' The Bumbles of the shipping world will pass the usual comment on this rule, which for 'interstitial' law-making takes the very highest rank.

The years since 1906 have not increased the certainty of maritime law, and they have impaired the tradition of enforceable customs of the sea."

In "A Review of Reviews in Admiralty" in the American Law Review, volume 56, page 770, it is said:

> "A recent decision of the Supreme Court of the United States in which the majority opinion

is written by Mr. Justice Holmes (*United States* v. *The Western Maid*, pet. 1922, U. S. Sup. Ct., Oct. Term, 1921, Nos. 21, 22, 23) evidences an application to the admiralty of the Austinian theory that as all law is given by the sovereign no subject can have any rights against that sovereign, in limitation of a jurisdiction formerly admitted to exist. It would appear to work prejudice to 'characteristic features' (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 (1920) of the general maritime law. In the sense of Mr. Justice Holmes that law is not '*corpus juris*' (*Sou. Pac. C.* v. *Jensen*, *supra*); if supplemented as it has come to be by the common law it is by the 'fiat of the judges,' since not adopted by act of Congress. He admits in *The United States* v. *The Western Maid* (*supra*), that 'however ancient may be the tradition of the maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic overlaw to which even the United States must bow.' The absence of positive statutory remedy in the principal case serves as justification in his opinion for adoption of the common law doctrine in derogation of the implied jurisdiction of admiralty and established precedent in the maritime jurisprudence of this country, although to use the words of Mr. Justice Holmes, the common law itself is not 'a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign.' If this decision does violence to approved rules of the general maritime law, 'adopted and established as part of the laws of the United States' by the

Constitution (*Knickerbocker Ice Co.* v. *Stewart*, *supra*): if these rules are consistent with that which is acknowledged in American jurisprudence to consist with the laws of the sea and of nations, this adjudication is futile to disestablish a maritime obligation which 'rests upon the common consent of civilized nations.' (14 Wall. U. S. 170, 187, 175 U. S. 577, 711.) The absence of statutory enactment is made the basis for this decision. But the Supreme Court has held: 'The bounds and limits of admiralty jurisdiction are matters of judicial cognizance and cannot be affected or controlled by legislation whether state or national.' (*Butler* v. *Boston Steamship Co.*, 130 U. S. 527.) Where constrained by the general maritime law it may not be changed by adoption of common law rules. This is peculiarly the case when jurisdiction turns upon the existence of a pure maritime lien 'over which the common law affords no remedy.' (*The Moses Taylor* (1866), 71 U. S. (4 Wall.) 411, 18 L. Ed., 397; *The Hime* v. *Trevor* (1866), 71 U. S. (4 Wall.) 555, 18 L. Ed., 451.)

'The preponderance of authority is with the dissent,' declares the California Law Review (May, 1922, Vol. X., p. 333). Like disapproval is read in the carefully prepared comments of the Columbia and Michigan Law Reviews. (Col. Law Rev., June, 1922, Vol. XXII, No. 6, p. 589; Mich. Law Rev., Feb. 1922, Vol. XX, No. 5, p. 533.) The Illinois Law Review (May, 1922, Vol. XVII, No. 1, p. 57), while differing from the reasoning of the Court, sustains its holding. Its analysis of the case and highly technical application of theory would be acceptable were this case not one in which fundamental concepts of the general maritime law

are controlling, were not adjudication constrained by 'a very limited body of customs and ordinances of the sea.' (*Sou. Pac. Co.* v. *Jensen*, *supra*, dissent of Mr. J. Holmes.) The vessels dibelled for collision damages while in the public service of the United States had been turned back prior to the proceedings to former owners, one being delivered to the U. S. Shipping Board and the other two, redelivered to private parties. 'The ultimate question was whether after the disability to sue, because of the possession of the United States was removed, a cause of action in admiralty remained.' Deciding in the negative, the majority of the Court held, in effect that the disability to sue to enforce claims against such vessels in the first instance was inconsistent with its existence, no tort relations being created; that merely 'anomic' relations ethical in character subsisted, upon which no action could be based. (Ill. Law Rev. *supra*. See also 'Nomic and Anomic Relations,' Cornell Law Quarterly, VII 11) The doctrine of the learned writer in the California Law Review that the legal relations were 'Mesonomic' does not alter the fact that by the general maritime law the claim subsists in law as a real right independent of possession, *in rem*, and good against all the world. The opinion of the Illinois Law Review that Mr. Justice Holmes' doctrine that there can be no legal claim against the sovereign because 'the authority that makes the law is itself superior to it' is 'sound political and irrefragible legal doctrine,' without which law would be moralistic chaos and 'the concept of the state swept to the four winds of the class struggle,' is answered by the California Law Review, holding that the doctrine that the

sovereign is immune from suit rests upon practical grounds of public policy and that it has no useful or beneficial application in the principal case. 'There is plenty of authority for the proposition that a lien attached at the time of the collision, irrespective of ownership, and is carried with the vessel 'into whosesoever hands it may come.' Nor is this a fiction. The enforcement of the lien would afford compensation to the injured party without either hindering the public service or endangering the public safety. * * * *Cessante ratione legis cessat ipsa lex.'* Were the theory propounded by the Illinois Law Review properly applicable it would have to be admitted that the principal case was successfully differentiated from *The Siren* (7 Wall. 152, 19 L. Ed. 129. 'The present cases, however, proceed on the negation of the lien itself. * * * The result would seem to be that henceforward there can be no proceeding *in rem* against property which was in the possession of the United States at the time when the cause of action accrued. Unless a maritime lien arises out of the transaction itself, admiralty jurisdiction *in rem* is unthinkable, for such liens are not created by subsequent agreements. Nothing subsequent can supply an original lack of vitality. It is difficult to reconcile the decision with *The Siren, supra*, the *Davis*, 10 Wall. 15, and *U. S.* v. *Lee*, 156 U. S. 196.' (Michigan Law Rev. *supra.*) The opinion 'seems inconsistent with *The Siren*,' reiterates the Columbian Law Review, 'for if there is no claim, it is difficult to see how there is a liability to be enforced when, by the act of the government, the vessel comes under the control of the Court.' (See Lord 'Admiralty

Claims against the Government,' 1919, 19 Col. Law Rev. 467.)

That Federal judicial opinion is drifting away from the great beacons of maritime law established by the founders of American admiralty jurisprudence is discernible to the observer. The father of the American admiralty system, Judge Richard Peters, holds: 'If by our own municipal laws, there are rules established, our Courts are bound exclusively to follow them. But in cases where no such rules are instituted, we must resort to the regulations of the maritime countries which have stood the test of time and experience, to direct our judgments as rules of decision.' (*Thompson, Jacobsen et al.* v. *The Ship Catherina*, 1 Peters Admiralty 104, 1795); and again: 'The provisions of the general maritime laws and the principles of the Roman or civil law, I am bound to respect, when relevant to points before me, in decisions on the admiralty side of this Court.' (*Watson* v. *The Ship Neptune*, 1 Peter's Admiralty, 142, 1800.) The more restrictive attitude of the Federal Courts is illustrated in the holding: the maritime usages of foreign nations are not obligatory upon the Courts of the United States, nor will they be respected as authority 'except so far as consistent with the well settled principles of English and American jurisprudence.' (252 Fed. 267; for further discussion see University of Pennsylvania Law Review, March 1922, Vol. LXX, No. 3, p. 185; Illinois Law Review, May, 1922, Vol. XVI, No. 1, p. 1). In respect to the facts in the principal case, it is submitted that aside from precedent in Roman law and the jurisprudence of civil law countries, the decision is a

departure not only from the historic viewpoint of American Courts but from British practice. (Michigan Law Review, February, 1922, Vol. XX, No. 4, pp. 407, 415-16). The British Courts differ essentially in their definition of maritime lien from American; it is a creature of the *lex fori.* (California Law Review, May, 1922, Vol. X, No. 4, p. 311.) Mr. Justice Storey has defined the true function of the admiralty court in respect to the obligation of the maritime lien: 'Where a lien exists upon property, upon general principles of justice, *jure gentium* that lien ought to be presumed and admitted by every sovereign until the presumption is repelled by some positive edict to the contrary.' (*United States* v. *Wilder*, 1838, 3 Sumner, 308, Fed. Cas. No. 694.)

It would appear that the majority opinion in the principal case has overlooked the true character of the right *'in rem'* or maritime lien. It is not based on 'tort' a violation of a private right remediable in a court of common law jurisdiction: but as said by Marshall: 'A court of admiralty does not seek to assert in behalf of a libellant a personal demand against a specific thing, the property of another, and give it the validity of a *jus in rem*, for, * * * the *jus in rem* subsists independently of possession if not state of title.' (*Rose* v. *Himely* (1808), 10 U. S. (6 Cranch) 281, 3 L. Ed. 224.) It is an appropriation of the thing made by the maritime law under the Constitution in the nature of the tacit hypothecation of Roman law. It does not pre-suppose an action against a person but against the vessel. Even if the personality of the ship be 'merged in that of

the sovereign,' this fact can in no way affect the validity of the lien. It arises *jure gentium* and not by the *lex fori* and survives by the law of nations."

In the Columbia Law Review, Volume 22, page 589, it is said:

"RECENT DECISIONS.

ADMIRALTY—MARITIME LIEN ON GOVERNMENT VESSEL—EFFECT OF SUBSEQUENT TRANSFER OF VESSEL.—A vessel had been chartered to the United States under a bare-boat charter and was employed as an army transport. While so engaged a collision took place. Afterwards, the vessel was returned to the owners and a proceeding *in rem* for the collision instituted. A petition for a writ of prohibition to prevent the District Court of the United States from exercising jurisdiction of the proceedings was brought. Held, Mr. Justice McKenna, Mr. Justice Day and Mr. Justice Clarke dissenting, the writ of prohibition should be granted. *The Western Maid* (1922), U. S. Sup. Ct. (Oct. T. 1921) Nos. 21, 22, 23.

It is the established rule in Admiralty that a collision between two vessels gives the injured party a present right of property, a *jus in re* in the offending ship, which follows the ship into the hands of all purchasers. *The Bold Buccleugh* (1851), 7 Moore, P. C. 267; see *The John G. Stevens* (1898), 170 U. S. 113, 115 *et seq.*, 18 Sup. Ct. 544. The vessel itself is regarded as the wrongdoer, liable for the tort and subject to a maritime lien for the damages. See *The John G. Stevens*, *supra*, 120. A vessel owned by the United States

> is immune from proceedings *in rem*. See *The Siren* (1868), 74 U. S. 152, 154. This, however, is solely a procedural limitation and the vessel is subject to all claims against it when by the affirmative action of the government the vessel becomes subject to the court's jurisdiction. *The Siren, supra;* see *The Davis* (1869), 77 U. S. 15, 21. The vessel has committed a wrong, for which, on grounds of public policy, there is no redress while owned by the government. See *The Siren, supra*, 155. When, however, such a vessel comes into the hands of a party capable of being sued, the claim against the vessel should become enforcible. To hold, as the instant case in effect does, that the ship has committed no offense because the claim could not be enforced while the government owned the vessel seems inconsistent with *The Siren;* for if there is no claim, it is difficult to see how there is any liability to be enforced when, by the act of the government, the vessel comes under the control of the court. See Lord, Admiralty Claims Against The Government (1919), 19 Columbia Law Rev. 467. The case seems inconsistent with the admiralty concept which regards the ship and not the owner as the offender."

In the Michigan Law Review, Vol. 20, p. 533, "Maritime Law—Personality of Ship—Immunity of Government Property," it is said:

> "The recent opinions of the Supreme Court in the three cases of the *Western Maid, Liberty* and *Carolinian* (U. S. Sup Ct., January 3, 1922) emphasize the non-liability of national ships in cases of collision. The *Western Maid,* owned by

the United States and manned by the navy, was in collision in New York Harbor. The *Liberty* was a pilot boat under charter to the Government and had a collision in the harbor of Boston. The *Carolinian*, also a chartered ship, had done similar damage in Brest, France. The two latter had been re-delivered to the owners, and the former to U. S. Shipping Board, when the libels were filed, so that the process in no way interfered with the possession of the sovereign. In each case the Supreme Court issued its extraordinary writ of prohibition to prevent district courts from exercising jurisdiction.

It had been the general opinion that ships of the Government incurred the same liability as those of individuals on account of maritime transactions, although that liability might not be enforced where it would be necessary to take the *res* out of the possession of the Government by any writ or process of the Court. *Davis*, 10 Wall. 15. The practice prevailed, to some extent at least, of filing a libel *in rem*, without the prayer for process, and requesting an appearance on behalf of the United States, in analogy with the English practice described in *The Siren*, 7 Wall. 152, 154. The existence of the maritime lien was assumed and suits *in rem* have been frequent, subject to the rule that property of the Government might not be attached unless it could be done without disturbing the possession of the United States. Thus the books contain suits for general average, *U. S.* v. *Wilder*, 3 Sumner 308; salvage, *U. S.* v. *Morgan*, 99 Fed. 572; sailor's wages, *St. Jago de Cuba*, 9 Wheat. 409; and material-men's claims;

Rev. Cutter No. 1, Brown's Admiralty 76. All cases of this nature pre-suppose the existence of a maritime lien, inherent in the *res* itself. If the Government consented to the suit, or if the suit could be prosecuted without disturbing its possession, the lien was enforced as in ordinary cases. The present cases, however, proceed on the negation of the lien itself, 'Legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp.' The result would seem to be that henceforward there can be no proceeding *in rem* against property which was in the possession of the United States at the time the cause of action accrued. Unless a maritime lien arises out of the transaction itself, admiralty jurisdiction *in rem* is unthinkable, for such liens are not created by subsequent agreements. Nothing subsequent may supply an original lack of vitality. It is difficult to reconcile the decision with *The Siren*, *supra*, the *Davis*, 10 Wall. 15, and *U. S.* v. *Lee*, 106 U. S. 196.

The brilliant writer of the majority opinion, Mr. Justice Holmes, answered the fundamental question, What constitutes the law? by 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law' (Collected Legal Papers, 173). In the same address, the body of reports, treatises and statutes are called 'the sybilline leaves in which are gathered the scattered prophecies of the past upon the cases in which the axe will fall.' The metaphor is a striking one; according to Vergil (Aeneid, III, 452), the Sibyl wrote her prophecies on the leaves of trees and so arranged

them within the cave that the approach of inquirers blew them into such confusion that their meaning became incomprehensible—*inconsulti abeunt sedemque odere Sibyllae.* The line will fit more than one admiralty practitioner whose clients are asking opinions about cargoes, for instance, lost in a collision between a car ferry operated by the Director General of Railroads and a Navy Transport allocated to the Shipping Board. The goal of the law is stability in fundamentals and the maritime law has enough reports and treatises and statutes to furnish a more substantial foundation than foliage, but its students are finding more truth than poetry in the metaphor. This will be more evident if the decision indicates a modification of the underlying doctrine of the personality of the ship. The minority of the Court, in a vigorous dissent, would seem apprehensive of this result. Such a consequence would be unfortunate. The basis of admiralty jurisdiction, and the only reason for not blending it with the common law, is its proceeding *in rem*, and that proceeding depends on the theory of maritime liens, which, in itself, rests upon the individuality of the ship. From the standpoint of business, the ship cannot sail without credit and it cannot have credit without maritime liens. These are familiar platitudes, but they are derived from the inherent nature of the business itself. Another is that capital cannot be secured for the business unless the investor can be assured of a definite limitation of liability, and this ultimately depends upon the personification of the ship. Tradesmen will not furnish a ship with supplies nor salvors aid

her in peril unless they have the assurance of the lien. The importance of the lien is quite as important in matters of tort, although not as conspicuous, since, for example, it is one of the elements of the underwriter's rate of premium for the running-down clause in the marine policy. At a time when we are making a colossal effort to establish a mercantile marine, with ships publicly, and not privately, owned, it will be unfortunate to impair their credit and segregate them further from the settled channels of the general maritime law. The majority opinion, it is true, warns us that 'we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic overlaw to which even the United States must bow.' There is, however, a very plain and definite law, to which even the United States must bow if it is to succeed in maritime affairs, and that is the general maritime law, or common law of the sea, and the established practices and requirements of the business."

CONCLUSION.

The claim or suggestion of the United States Attorney should be dismissed because not proved and because not presented by a proper officer; or should be regarded as a submission to jurisdiction enabling the collision lien to be enforced as a cross or intervening claim.

Respectfully submitted,

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Appendix.

In *Furness, Withy & Co. v. Miller*, (unreported; May 11, 1925, Supreme Court Dist. of Col.), the Court said, in part:

"As stated above, the proposition of plaintiff, briefly stated, is, that the claim sued upon is one arising under Section 12, of the Trading with the Eenemy Act, construed and applied in the light of the Executive Orders, *supra*.

As originally enacted, the Trading with the Enemy Act, with the exception of Section 12, had to do chiefly with the seizure and prompt liquidation of alien enemy property; in respect of which, its provisions were direct and explicit, or, at least, were quite evidently intended so to be. So far, however, as concerned the matter of continuing the business as a going concern of property seized, and which, from the nature of the property so seized, might appear to be necessary in order to prevent waste or for its protection, the provisions of the Act were more or less imperfect—doubtless the necessary details had not then been comprehensively worked out or determined. At any rate, and whatever may have been the reason, Section 12, having authorized, in general terms, the continued management, by the Alien Property Custodian, of property seized, with all the powers of a common-law trustee, and in like manner as though he were the absolute owner thereof, authorized the President of the United States to prescribe rules and regulations in respect thereof. Such rules and regulations were so prescribed and promulgated; and the question now arises whether said Section 12, and the Executive Orders issued thereunder, authorize a suit such as the present.

As already indicated, said Section 12 clearly contemplated that certain of the property seized should continue to be operated, and it conferred authority so to do, although in somewhat general terms; leaving the details to be supplied by rules and regulations by the President. Therefore, when such rules and regulations came to be prescribed, as they later were (Executive Orders Nos. 2813 and 2916, *supra*), they became part of the law itself; certainly to the extent that they are embraced within the limitations of the authority so conferred.

The President authorized the continued conduct and operation of the business of a going concern, including the right of purchase and sale, both of materials, supplies, commodities, and product; he authorized the Alien Property Custodian to file, prosecute and maintain any claim or suit growing out of transactions had prior or subsequent to seizure but growing out of the conduct or operation of such business; he authorized the Alien Property Custodian *to prosecute or defend, as the case may be;* and, evidently in order that there might be no misunderstanding about the matter, but none the less significantly, he exempted the Alien Property Custodian, and his agents, managers, etc., from *personal liability* concerning any matter, debt, or obligation of any kind growing out of the conduct or operation of any going business or concern, except in the event of international injury or fraudulent misconduct.

It would seem unthinkable, as it would be both unreasonable and intolerable, to assume that Congress contemplated or intended to clothe the Alien Property Custodian with full power and authority to engage in business, but with immunity from obligation of any kind whatever in respect thereof to those with whom he might

happen to do business; since that must be the logical conclusion of an asserted immunity from suit.

If the allegations of fact contained in the complaint be true, for the purpose of the motion to dismiss, the Court must assume that they are true, the plaintiff has sustained an actual loss and damage in large amount, growing out of a final payment of $120,000, it was improperly induced to make by an agent and representative of the Alien Property Custodian; the transaction itself growing out of the conduct and operation of a going business and concern seized by the Alien Property Custodian; and which payment, thereupon, found its way into the gross assets, amounting, thus increased, to some $660,000, of the alien enemy whose property was seized. In other words, the alien enemy corporation has been enriched by moneys of plaintiff, and to which in equity it is not entitled.

Accordingly, it is the opinion of the Court that the motion of defendants to dismiss the complaint should be *overruled.*"

JAN 5 1926
WM. R. STANSBU
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IN THE

Supreme Court of the United States,

OCTOBER TERM—1925.

No. 94.

LITTLEJOHN & CO., INC., *et al.*,

Appellants,

—against—

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANTS.

JAMES W. RYAN,
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IN THE

Supreme Court of the United States,

OCTOBER TERM—1925.

No. 94.

LITTLEJOHN & CO., INC., *et al.*,

Appellants,

—against—

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANTS.

POINTS.

I.

A Resolution of Congress which does not expressly disaffirm recognized rules of international law designed to mitigate the horrors of war should be held not to authorize violations of those rules if any intent can be given consonant with the rules.

Counsel for the Government concede in their brief that the Government's claim or suggestion rests on the assumption that Congress by the Resolution of May 12, 1917, intended to authorize a violation of both international law and maritime law. They say (at p. 13):

> "Condemnation proceedings in a prize court are usual in maritime law and are useful in set-

> tling titles to vessels against all the world, but such a proceeding may be dispensed with by Congress."
>
> "Under the Resolution of May 12, 1917, the institution of proceedings in a prize court was not necessary to the acquisition of title or lawful possession. The resolution did not provide for any such judicial proceeding."

In support of these statements they cite a quotation from the majority opinion in *The Western Maid,* 257 U. S. 419, 432, that, "There is no mystic over-law to which even the United States must bow" and the statement of Judge Augustus Hand in his opinion in this case that "International law will be enforced in our courts but not in the face of a constitutional act of Congress" (R. 57).

They rest on the theory that Congress by the Resolution of May 12, 1917, intended to authorize a confiscation of the *Antigone*, and that under the decisions of this Court in *Brown* v. *United States,* 8 Cranch. 110, and *Miller* v. *United States,* 11 Wallace 268, this Court cannot curb an attempted confiscation which admittedly violates the recognized usages of nations constituting the law of war or prize. The point to which counsel for the Government have devoted their entire brief does not arise until it is determined that Congress by the Resolution of May 12, 1917, intended to do more than detain and operate the *Antigone* as seized enemy property in the same way that Great Britain and France detained and operated the vessels seized by them, and in the same way that the Alien Property Custodian detained and operated the enemy owned factories and "going concerns" on land. If the *Antigone* was merely detained and operated as property which had been seized but which still belonged to the enemy owner, the United States was acting merely as an Alien Property Custodian or Public

Trustee and was not bound at the end of the war to return her to her owner free from physical injuries and maritime collision liens incurred as a result of ordinary marine risks to which she was subjected during her war operation.

This is one of the facts which markedly distinguish this case from *The Western Maid,* 257 U. S. 419. In *The Western Maid* three vessels were involved. One was owned absolutely by the United States. The United States had promised by written charter party to return the other two vessels to their American owners at the end of the war free from physical injuries and maritime collision liens. The lien liability in *The Western Maid* therefore was that of the United States. The lien liability in the present case however is that of the German owned vessel and, looking at the case as of the time of the collision, would be enforced by a sale of the vessel at the end of her war service and thus be paid by the German owner, who would look for recoupment to his own Government.

However as counsel for the Government have briefed only the first point above mentioned, and as it is also one of the principal questions certified by the District Court we will discuss it first.

Judge Hand has certified "for the decision of the Supreme Court of the United States" (R., 60) "the questions of law" (R., 60) arising from his holding:

> "2. That Congress by the Joint Resolution of May 12, 1917, did not contemplate a deposit of the vessel's value, or proceedings in a prize court.
>
> 3. That, as so interpreted, the resolution, although in violation of International Law, should be regarded by this Court as a valid exercise by Congress of its war power" (R., 60).

Both international law and maritime law consist of the usages of nations. Counsel for the Government do not contend that the fact that one nation, the United States, determined arbitrarily to violate such usages indicates that the usages did not exist or were inapplicable. They merely wish to extend to international law the decision of this Court in the *Western Maid* with reference to the maritime law.

It is significant that counsel for the Government on page 13 of their brief slur over any difference between international law and maritime law by saying that "condemnation proceedings in a prize court are usual in maritime law". The law of prize or seizure of enemy vessels in time of war is part of international law, not maritime law. The law of collision which alone was involved in the *Western Maid,* is part of maritime law.

The attitude of counsel for the Government toward international law shown in their brief does not, we respectfully submit, accord with the decisions of this Court or with the attitude of the United States as represented by its statesmen and official spokesmen such as former Secretaries of State Hughes, Root and Hay and Ambassador Choate.

The pernicious and far-reaching results of the short-sighted national policy suggested by counsel for the Government are best illustrated by a news item in the New York Times on December 25, 1925, which is applicable to this very case. The item reads as follows:

"BRITAIN DENOUNCES ENEMY SHIP CLAUSE

Chamberlain Explains Why Powers Failed to Ratify Hague Convention.

London, Dec. 24, 1925. Britain's denunciation of The Hague Convention regarding enemy mer-

chant ships was made known today, when the Foreign Office sent to representatives abroad announcements to that effect signed by Sir Austen Chamberlain, Foreign Secretary.

'The aspiration of the framers', wrote Sir Austen, 'was not only to introduce uniformity of practice into treatment by belligerent States of enemy ships found in their ports at the outbreak of hostilities but to insure amelioration of their lot in such circumstances.'

According to Sir Austen, this purpose has wholly failed of achievement. While some countries signing the convention, he states, allowed enemy vessels to leave their ports during the World War, most of the countries confiscated them at the beginning of hostilities. But under the convention, he says, the British Privy Council held that such ships, if not allowed to depart freely, could only be detained and not confiscated. This ruling in future might place England at a disadvantage, he says, and hence the decision to denounce the convention.

Of the powers signing the convention, seventeen failed to ratify; two, Germany and Russia, ratified with important reservations, while the United States did not sign at all, he declares."

The section of the Hague Convention of 1907 referred to in the above quoted dispatch is quoted in full at page 65 of our main brief. The American delegation refused to sign the Convention on the ground that it did not go far enough to express what had already become an absolute binding obligation so far as the United States was concerned. See the American Delegation's Report in Foreign Relations of the United States, 1907, at page 1158.

Joseph H. Choate, who represented the United States as First Delegate at the Hague Peace Conference in 1907, at pages 74 to 77 of "The Two Hague Conferences"

(being the lectures delivered in 1912 by Mr. Choate at Princeton University), said:

> "We went instructed by our Government [through Secretary of State Root] to maintain, to the best of our ability, our old claim for the immunity of private property at sea, that is, of private and unoffending property, not contraband, even in enemies' ships at sea in time of war. Franklin had endeavored to have this inserted as a substantial clause in the treaty of peace between us and Great Britain in 1783, placing private property at sea in the same position of immunity as private property on the land; that except in cases of contraband, it should not be liable to capture, which was a very important move in the direction of saving inoffensive and unoffending commerce from spoliation and destruction in case of war, and very much for the benefit of the world at large, to make commerce free always from interruption by war any further than was absolutely necessary.
>
> Time and again our government had pressed it during the intervening hundred years between Franklin's death and the meeting of the Conference. They had proposed it at the First Conference, from which it was absolutely excluded, although Dr. White succeeded in putting on file a very powerful memorial in support of it, and made a most effective address in its behalf.[1] The First Conference would not listen to it; they said it was not within the programme, but recommended the careful study of it for consideration of the next Conference, where it properly came up. We had it inserted, by Franklin himself, in the treaty of 1785 with Prussia, and once we had it in a treaty with Italy, and several times other nations, imitating that example, when war broke out between them, agreed, at the outbreak, that there

[1] For the proceedings of the First Hague Conference concerning the immunity of private property on the high seas and for Dr. White's address, see Holls' 'The Peace Conference at The Hague', pages 306-321.

should be such immunity, but no substantial progress had been made in the way of its recognition as an international doctrine when our Conference met.

Of course, most of the great nations opposed it. Germany was the only one of the great fighting nations that voted affirmatively with us, but it was very respectfully considered and fully discussed, and after several weeks, in which it came up from time to time, almost two-thirds of the nations voting, that is, by a vote of twenty-one to eleven, recorded their votes in favor of the establishment of such immunity. See 'Deuxiéme Conférence Internationale de la Paix', Vol. III, pages 834-835. It was not found possible, however, in the face of great commercial nations that opposed it, and which were likely at any time to be engaged in war, to press it further. Our orders were not to press anything to the point of irritation, but if we found it impossible to carry a matter through at this Conference, to carry it as far as we could and then drop it leaving it for further consideration, in the hope that by and by, with the growing sense of international justice, it would be accepted by the nations.[2]

So there it stand for these twenty-one nations who supported us to enter into such an agreement among themselves, or in case of war breaking out between any of them, to make a special agreement for the immunity, or for action by the next Conference to be held in 1915.

So there again, very positive progress was made. We stand no longer where we did at the beginning of the Conference, nobody assenting to it but ourselves, but twenty other nations of greater or less importance pledged to the proposi-

2 For the action of the American Delegation of the Second Hague Conference in the matter of the immunity of private property on the high seas, see Mr. Choate's address of June 28, 1907, in 'Deuxieme Conference Internationale de la Paix', Vol. III, pages 750-764. For an English version of the address, see pages 766, 779; also Scott's 'American Addresses at the Second Hague Peace Conference', pages 1-24.

tion which would make so strongly for peace and for the limitation of armaments."

Great Britain, France and all the other nations involved in the War, recognizing the applicability of this Hague convention merely violated it to the extent of detaining or sequestering and operating the seized ships during the war as detained enemy vessels. At the end of the war they all claimed that by the Treaty of Versailles the Germans voluntarily granted permanent possession and title to these detained ships to the Reparations Commission or to the nation which detained or seized them.

Our contention is that the United States operated these ships on the same basis as all other nations and that notwithstanding the somewhat confusing literal language used in the first paragraph of the Resolution of May 12, 1917, Congress did not intend that the President should do more than operate as seized enemy property the ships which in April, 1917, had been detained or sequestered.

Such course would not require any proceeding in a prize court, and explains the rejection by Congress of the proposed prize court amendment to the Resolution.

This was the policy that Congress later adopted in the Trading with the Enemy Act of October 6, 1917, with reference to privately owned enemy property seized on land. Congress did not intend to condemn permanent possession or title or any property right of the German owners. Such course would have required a prize court proceeding.

Construed as we suggest, the Resolution was both constitutional and in accordance with international and maritime law.

The history of the Resolution, the actual sequestration of the ships long before the Resolution was introduced, the traditional policy of the United States and par-

ticularly its treaties with Prussia and its official attitude at the Hague Conventions, all show that this is the only reasonable interpretation of the Resolution.

The Resolution is capable of the construction suggested by counsel for the Government only by divorcing it absolutely from the circumstances attending its passage and from the officially declared policy of the United States.

In *The Buena Ventura,* 175 U. S. 384, this Court held that inasmuch as enemy merchant vessels innocently in United States ports just before the outbreak of hostilities in the war with Spain "would, in accordance with the later practice of civilized nations, be the subject of liberal treatment by the Executive" it became necessary, upon the issuance of an Executive Proclamation respecting the treatment of merchant vessels, "to put upon the words used therein the most liberal and extensive interpretation of which they are capable", and that where there were two or more interpretations which possibly might be put upon the language, the one which would be most favorable to the enemy nationals ought to be adopted. This Court based its interpretation of the exemption claimed partly upon the historic attitude of the United States in favor of the mitigating, as to all noncombatants, of the hardships and horrors of war, and partly also upon the later practice of civilized nations.

John Bassett Moore in his Digest of International Law, vol. VII, at page 453 says:

> "It was formerly the practice not only to seize enemy vessels in port at the outbreak of war, but also to lay an embargo upon them in expectation of war, so that, if war should come, they might be confiscated. A rule of precisely the opposite effect has been enforced in recent wars."

See also our main brief, pages 26, 63 and 70.

Miller v. *United States*, 11 Wallace 268, is not a precedent in conflict with the others we have cited. Its justification is that a sovereign seeking to subjugate rebellious subjects is not in the position nor bound by the rules that govern the conduct of one state making war against another. The question of confiscation under the Captured and Abandoned Property Acts did not come before this Court in its international aspect. The decision reached by the majority of the court, stated by Mr. Justice Strong, is undoubtedly correct, but the dissenting opinion of Mr. Justice Field enunciates more correctly the principles upon which the decision should have been reached.

The inapplicability to this case of the decisions in *Miller* v. *United States*, 11 Wallace 268, and in *Brown* v. *United States*, 8 Cranch 110, has been so conclusively shown by John Bassett Moore, the leading American authority on international law, and by Edwin M. Borchard that we quote at length from the article by Professor Borchard incorporating their views regarding those two decisions.

In 23 Columbia Law Review 383, "Are We Entitled to Confiscate Enemy Private Property", by Professor Edwin M. Borchard of Yale Law School, it is said:

> "The provision of article 297 of the Treaty of Versailles, by which private property of ex-enemy nationals has been take over by several of the Allied governments, sanctioned a policy of confiscation, a practice which, for the most practical of reasons—its short-sightedness—had been abandoned since 1793, and which few students of international law believed would ever be revived. * * * Attention has previously been called to the law and policy of confiscation in its general development; the present comment, confined more

particularly to American law and practice, is induced by a *dictum* of Judge Rogers of the Circuit Court of Appeals in *Miller* v. *Kaliwerke Aschersleben Aktiengesellschaft* (C. C. A. 2nd Cir. 1922) 283 Fed. 746, 757, to the effect that 'as respects the enemy bona fide holder * * * the government is plainly entitled to confiscate his interest in an American corporation'.

Whether the court intended to convey by the word 'entitled' the idea that the United States was legally privileged to confiscate the private property, on general principles or under existing law, is not clear. The court does not appear to have studied the question very closely, but relied for its authority on the Civil War case of *Miller* v. *United States,* 11 Wallace 268. It becomes, therefore, of some interest to examine the *Miller* case. Judge Rodgers is not the first person who has used it as the American judicial authority for confiscation of enemy private property—mistakenly and unjustifiably, it is believed.

On August 6, 1861, Congress passed an Act to confiscate property which was used or intended to be used in aid of the rebellion; on July 17, 1862, a further Act was passed 'to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes'. Contrary to the Act of 1861, the Act of 1862 was designed not to forfeit property unlawfully employed, but to punish individuals who had aided the rebellion by confiscating all their property. The offense was personal. The sixth clause of the fifth section of the Act of 1862 provided that 'the property of any person who, owning property in any loyal State * * * shall hereafter assist and give aid and comfort to such rebellion' was to be forfeited. The information against Miller alleged not only that he was a 'public enemy' but also that he was a 'rebel citizen', and that as owner of certain railroad stock, he had employed it 'in aid of the enemy' and had

'assisted and given aid to the rebellion against the Government'.

Such being the purpose of the statute and the facts under which Miller's property was forfeited, Miller's executor in a subsequent proceeding challenged the validity of the forfeiture on the ground that due process had been lacking in that Miller had been denied a jury trial, according to the fifth and sixth amendments. To escape this contention, Justice Strong, for the majority of the Supreme Court, found that the plaintiff's default had made a jury unnecessary, and further held that the Acts were passed under the war powers of Congress, which, he said, relieved Congress from the restrictions of the fifth and sixth amendments. He then undertook to assume what he should have sought to prove; namely, that war authorizes the confiscation of enemy private property found in one's own territory. Justice Strong says:

> 'Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be *legitimately* prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right'.

He added

> 'that the right to confiscate the property of all public enemies is a conceded right'. (Italics are the author's.)

Had Justice Strong consulted the decision of Chief Justice Marshall and the political history of the United States he would probably not have come to this conclusion. He reached it apparently without the citation of any authority and seemingly without knowledge that there was any law on the subject in the United States. Justice Field, speaking for the minority, seems to have been far

sounder in his judgment, for he said that even the Congressional power 'to make rules concerning captures on land and water is a power to make such rules as Congress may prescribe, *subject to the condition that they are within the law of nations.*' (Italics are the author's.) He concluded that confiscation was contrary to international law and to the decisions of the Supreme Court.

The law of nations on this subject is believed not to be in doubt. Not only our courts, but American political traditions and the authorities on international law unite to condemn the ancient practice of confiscation as contrary to the modern law of nations. To take the writers first, the whole law is summarized in a few paragraphs by John Bassett Moore. He says:

> 'It is true that in certain early writers who reiterated the stern rules of the law of Rome, sweeping generalizations may be found in which the right is asserted on the part of enemies to seize all property and confiscate all debts. The same writers, upon the same authority, assert the lawfulness of treating all subjects of the belligerent as enemies, and as such of killing them, including women and children. These generalizations, even at the time when they were written, neither expressed nor purported to express the actual practice of nations, and it is superfluous to declare that the law of the present day is not to be found in them; for, with the change in the practice of nations, growing out of the advance in human thought, the law also has changed.'

Mr. Moore adds, after reviewing the authorities:

> 'Finally, without unnecessarily multiplying authorities on a point which is undisputed, we may quote from Hall the following passage:
>
> '"Property belonging to an enemy which is found by a belligerent within his own juris-

diction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation".'

The American tradition in this matter was laid in the treaties of 1783 and 1794 with Great Britain. Under the former we undertook that the states, some of whom had during the Revolution confiscated British property and credits, would restore the owners in their rights; and under the treaty of 1794 we paid Great Britain some six hundred thousand pounds sterling because of our inability to enforce upon the states the treaty promise of 1783. It was in support of this provision of the Jay Treaty of 1794 that Hamilton wrote some of his famous Camillus Letters, which have been regarded as the classic American expression of policy.

The courts of the United States, while not always so clear, have, nevertheless, with the possible exception of the *Miller* case, added their authority to sustain the American tradition. As early as 1796 in *Ware* v. *Hylton*, where a confiscatory act of Virginia was denied validity by the Supreme Court, Justice Paterson remarked that even at that date the confiscation of private property was considered 'as a relic of barbarism * * * it ought not to have existed among any nations and perhaps is generally exploded at the present day in Europe.' He added, speaking of confiscation, 'the gain is at most temporary and inconsiderable; whereas the injury is certain and incalculable and the ignominy great and lasting'. Justice Wilson added: 'By every nation, whatever its form of government, the confiscation of debts has long been considered disreputable'. Debts, of course, are merely one form of property.

Chief Justice Marshall in the famous case of *Brown* v. *United States*, 8 Cranch 110, not altogether removed from the influences of the eigh-

teenth century and of the fact that he had been counsel for Hylton in *Ware* v. *Hylton*, 3 Dallas 199, and therefore had sought to defend the validity of a title derived through confiscation, made a somewhat equivocal statement as to the law, which has required some explanation. He said: 'Respecting the power of government, no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself * * * although, in practice, vessels with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war'.

He added therefore that 'according to modern usage', private property 'ought not' to be confiscated. He said 'this usage * * * cannot be disregarded by (the sovereign) without obloquy.'

Some doubt has been created by this passage because it apparently sanctioned the 'right' of confiscation, but condemned its exercise as 'affected' by modern usage. In fact, Marshall acted in the case upon the rule that it was contrary to international law to regard private property on land as subject to confiscation. If, however, the 'exercise' of a right has become unlawful by usage, it is not easy to see how the right itself could help being impaired. No one has pointed this out more clearly than John Bassett Moore. Speaking of Marshall's professed distinction between a right and the exercise of a right, he has said:

> 'Referring to the practice of nations and the writings of publicists (Marshall), declared

that according to "the modern rule, tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated"; that "this rule" seemed to be "totally incompatible with the idea that war does of itself vest the property in the belligerent government;" and consequently, that the declaration of war did not authorize the confiscation. Since effect was thus given to the modern usage of nations, it was unnecessary to declare, as he did in the course of his opinion, that "war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found", and that the "mitigation of this rigid rule which the humane and wise policy of modern times has introduced into practice" though they "will more or less affect the exercise of this right", "cannot impair the right itself". Nor were the two declarations quite consistent. The supposition that usage may render unlawful the exercise of a right, but cannot impair the right itself, is at variance with sound theory. Between the effect of usage on rights, and on the exercise of rights, the law draws no precise distinction. A right derived from custom acquires no immutability or immunity from the fact that the practices out of which it grew were ancient and barbarous. We may, therefore, ascribe the dictum in question to the influence of preconceptions, and turn for the true theory of the law to an opinion (*United States* v. *Percheman*, 7 Peters 51), of the same great judge, delivered twenty years later, in which he denied the right of the conqueror to confiscate private property, on the ground that it would violate "the modern usage of nations which has become law".'

Since Marshall's decision in the *Percheman* case, the judicial view as to the illegality of confiscation, confirming as it did the political view

> of national policy, was regarded as settling the question for the United States. The unsoundness of using the Confiscation Acts of 1861 and 1862 as precedents or authority for the confiscatory treatment of the private property of foreign enemies in a foreign war is pointed out by Mr. Hyde in his recent work. Justice Strong, therefore, in assuming the Acts to have been passed under the alleged 'conceded right' of belligerent confiscation fell into error, it is believed, and Judge Rogers, in following that *dictum* without question, would appear to have been misled."

In *United States* v. *Klein* (1871) 13 Wallace 128, speaking of the Act of March 12, 1863, Chief Justice Chase said:

> "There is, so far as we are aware, no similar legislation mentioned in history."

Notwithstanding the obviously confiscatory nature of that Act, this Court held, basing its decision upon the law of nations, that

> "'the Government constituted itself the trustee for those who were * * * entitled' or 'whom it should thereafter recognize as entitled' to the captured property and that 'the Government recognized to the fullest extent *the humane maxims of the modern law of nations, which exempts private property of non-combatant enemies from capture as booty of war.*' Accordingly, 'the title to the proceeds of the property which came to the possession of the Government by capture or abandonment, with the exceptions already noticed, was in no case divested out of the original owner'."

In *The Paquete Habana*, 175 U. S. 677, a case arising out of the seizure of a fishing vessel during the Spanish War, this Court, after reviewing at length the origin of

and reasons for the rule, followed the rule of international law against confiscation of enemy private property.

In England the rule has been settled for more than a century that acts of confiscation by a belligerent of unoffending, privately owned enemy property, are in violation of the usages of nations and are void.

In *Wolff* v. *Oxholm* (1817) 6 M. & S. 92, an action on a pre-war debt, the defense was that the Danish government during the war had confiscated such debts. Lord Ellenborough expressly held that the confiscation act of the Danish government was "not conformable to the usage of nations" and therefore was not binding on an English court.

In *2 Oppenheim on International Law* (2d ed.) 139 it is said that:

> "'Through the influence of such treaties as well as of Municipal Laws and Decrees enacting the same, an international usage and practice grew up that belligerents should neither confiscate enemy property nor annul enemy debts on their territory'. He then says that the last case of confiscation occurred in 1793 and continues: 'there is now a customary rule of international law in existence prohibiting the confiscation of private enemy property and the annulment of enemy debts on the territory of a belligerent'."

In *Hall on International Law* (6th ed.) 435 it is said:

> "The common interests of all nations and present feeling, warrant a confident hope that the dying right will never again be put in force, and that it will soon be wholly extinguished by disuse."

In *Fiore on International Law* (5th ed. 1918, E. M. Borchard's translation) it is said:

> "The private property of enemy citizens should be regarded as inviolate in war on land as well as in maritime war, subject, however, to the limitations which may be regarded as based upon the necessities of war, the damages and destruction justified as incidental to attack or defense, and in certain well-established cases, the liability to confiscation, when the belligerent may be regarded as authorized to exercise the right of prize capture."

See to the same effect:

2 Westlake on International Law (1902 ed.) 42;
Wheaton on International Law (8th ed.) Sec. 298, page 378;
Bentwick, Law of Private Property in War, page 26;
Lawrence on International Law (3rd ed.) Sec. 196, pages 350, 352;
Alexander Hamilton, Camillus Letters (1795) XIX;
7 Moore, International Law Digest 462.

The United States has from the beginning recognized international law as part of the law of the United States.

As early as 1796 Mr. Justice Wilson said that "when the United States declared their independence they were bound to receive the law of nations in its modern state of purity and refinement". *Ware* v. *Hylton,* 3 Dallas 199, 281.

In *The Paquete Habana,* 175 U. S. 677, Mr. Justice Gray, delivering the opinion of this Court said:

> "International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who, by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat."

The statesmen and jurists of the United States have regarded the acceptance of the rules of international law as a part of the condition on which a state is originally received into and entitled to remain in the family of nations.

Lord Russell of Killowen, in his speech to the American Bar Association in 1896 (30 American Law Review 643; quoted in 16 Am. & Eng. Ency. of Law 1125) said that the definition of international law in *Regina* v. *Keyn,* 2 Exchequer, Div. 153, was too narrow because it "relies too much on force as the governing idea". He said further:

> "If the development of law is historically considered, it will be found to exclude that body of customary law which in early stages of society precedes law, which assumes definitely the character of positive command coupled with primitive sanctions * * *. As government becomes more frankly democratic * * * laws bear less and less the character of commands imposed by a coercive authority, and acquire more and more the character of customary law founded on con-

> sent * * *. I claim then that the aggregate of the rules to which nations have agreed to conform in their conduct toward one another are properly to be designated 'international law' ".

In *Regina* v. *Keyn,* 2 Exch. Div. 153, Lord Coleridge said:

> "The law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and acts of state are but evidence of the agreement of nations, and do not in this country (Great Britain) at least, *per se* bind the tribunals. Neither, certainly, does a consensus of jurists; but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English courts give effect, as part of English law, to such agreement."

In Kent's Commentaries, vol. I, page 19, it is said:

> "In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law."

Professor John Dewey of Columbia University in 23 Columbia Law Review 316, 317, reviewing Sir Frederick Pollock's Essays in the Law, said:

> "We select the essays on 'The History of the Law of Nature' as typical of the merits of the book. The first traces the fortunes of the doctrine from Aristotle, through the Stoics and Roman lawyers, the medieval and renaissance doctrines, down to Protestant and Reformation influences, and then shows how *under the name of 'reason' the same ideas became incorporated in*

> *English common law*—the 'law of nature' having too much flavor of Roman law and of ecclesiastic courts to recommend itself to English lawyers. It is shown that amid all these historic vicissitudes, natural law has had a single common function: that of supplying an ethical standard for legal ideas and practices, and that the application of the ethical criterion has been saved from becoming private and arbitrary by identifying natural law or the law of reason with custom in the degree of its generality or area of acceptance. The second essay on this subject traces *the beneficial influence of the idea in English law, pointing out the indebtedness to it of national acknowledgment of international practices so that they become true law*; of the incorporation of the Law Merchant into common law; of the development of the doctrine of quasi-contracts; of that of negligence; *of the development of legal jurisdiction in cases where at first there seems to be no legal remedy available*; of court review of the quasi-judicial decisions of administrative bodies; of private international law." (Italics ours.)

The statement of Judge Hand in his opinion below that the Treaty with Germany nullified any property right or maritime lien the appellants theretofore had in the *Antigone* is not supported by counsel for the Government in their brief in this Court. The statement is of course unsound because Judge Hand apparently overlooked the fact that the appellants are American citizens and British neutrals. The nullifying by Act of Congress or Treaty of their vested rights would be unconstitutional. It would deprive them of their property without due process of law. As said by Arthur T. Hadley in The Constitutional Position of Property in America, in *The Independent*, April 16, 1908:

> "The general status of the property owner under the law cannot be changed by the action

of the legislature or the executive or the people of the state voting at the polls, or all three put together * * * The fundamental division of powers in the Constitution of the United States is between the voters on the one hand and property owners on the other. Forces of democracy on one side, divided between the executive and the legislative, are set over against the forces of property on the other side, with the judiciary between them."

II.

Congress by the Resolution of May 12, 1917, did not intend to do more than detain and operate the *Antigone* as seized enemy property in the same way that Great Britain and France detained and operated similar vessels seized in their ports, and in the same way that the Alien Property Custodian detained and operated factories and "going concerns" on land. Such detained property is not property of the United States and it would be unfair to give such enemy owned property greater immunity from the jurisdiction of the courts than is accorded to property owned by American citizens who are helping to defend the United States from the enemy. THE BLONDE L.R. (1922) 1 A.C. 313, at IMPORT

The question regarding the nature of the Government's relations to the seized ships is exceedingly important from a practical point of view. If our contention is adopted that the United States merely operated them as detained enemy owned vessels, as Great Britain did, without assuming the marine operating risks, and did

not assert to itself any property right of possession or ownership until that right was granted by the Peace Treaty with Germany, the United States, if it ever grants compensation to the German private owners either freely or by compulsion of an international tribunal, will have to pay them only about $70,000,000, being the market value of those vessels at the time our treaty with Germany was entered into, which was after the slump in vessel values due to the then excess of tonnage for peace needs.

If the contention of counsel for the Government is adopted that the United States did not merely detain and operate the vessels but asserted a property right of possession or ownership in them at the time of the seizure in April, 1917, the United States in order to compensate the German owners would have to pay a sum conservatively estimated at in excess of $300,000,000, being the charter value of the vessels for the period of the War, or their market value in April, 1917 (such charter value and market value being substantially equivalent).

The issues have been narrowed by the Government's brief. Counsel for the Government abandon reliance upon the Treaties of Versailles or Berlin. They also rest squarely on the theory that the Government confiscated the *Antigone* under the authority of the War of 1812 case of *Brown* v. *United States* and the Civil War Confiscation and "Rebel Citizen" Case of *Miller* v. *United States.*

Restatement of the Facts.

A summary restatement of the facts in the light of these changes in the issues will, we believe, tend still further to simplify the case.

This is a libel in admiralty to enforce a maritime lien on the Steamship *Antigone* for collision damages. The libel alleges that after the collision the United States by the Treaty of Versailles (which became effective by the ratification of France on October 13, 1919), supplemented by the Treaty of Berlin, acquired the *Antigone* subject to the collision lien.

The *Antigone* at the time the libel was filed was admittedly subject to the ordinary *in rem* process of the admiralty court. The *in personam* form of the remedy sought under the Suits in Admiralty Act is without significance because that remedy, so far as this case is concerned, is a mere substitute for an *in rem* proceeding against the vessel.

The United States Attorney at New York, through two of his assistants, signed and filed a claim (so described by Judge Hough—R. 23) or "suggestion" to the *Antigone* which is unsupported by any of the usual documents showing right of possession of a vessel, but which alleges that she had been seized in war time and at the time of the collision was an Army transport and was therefore a public vessel owned by the United States and immune from liability or lien.

The issue therefore is whether the relation of the United States to the *Antigone* on October 9, 1919, when the collision occurred, was such as to entitle the vessel to immunity from the ordinary jurisdiction of the admiralty courts for a violation of the maritime rules designed to prevent collisions and loss of life and property at sea. Whether this relationship was such as to entitle

the vessel to immunity can best be determined by considering the problems relating to these ships which Congress and the President were trying to solve, and not merely by reading the Resolution of May 12, 1917, as a written instrument entirely divorced from the situation which resulted in its adoption.

At the outbreak of the war in 1917 many unarmed German private merchant vessels were in United States ports. The same situation existed in England in 1914 when it declared war against Germany. Under the sixth section of the Second Hague Convention in 1907 these vessels could not be detained, confiscated, or requisitioned on payment of compensation, but must be given three days of grace within which to return to Germany. Instead of allowing the days of grace, England seized these vessels in its ports. Later, apparently in response to a protest by the United States that the seizure was a violation of international law, Sir Edward Grey, the British Foreign Secretary, explained that although Germany had formally signed and ratified the Hague Convention, England, not being satisfied that Germany would observe the convention, wanted a further promise covering this particular war that Germany would observe the convention as to English vessels in German ports. American White Book, European War, vol. I., pp. 44, 46, Letter Sir Edward Grey to Mr. W. H. Page, American Ambassador at London, February 19, 1915. No answer containing such further promise having been received within the time limit of an alleged ultimatum, the Crown brought suits against the vessels in the prize courts and they were "sentenced to detention in lieu of condemnation". American White Book, European War, I., 44, 46.

The detained vessels were operated by the English Government as detained, enemy-owned vessels. England regarded the detained vessels while being operated by it as in the same class as the other enemy private prop-

erty, such as factories, munition, aeroplane-parts, and chemical plants, etc., which its Public Trustee (corresponding to our Alien Property Custodian) had seized and was operating. England declared that it was merely detaining the vessels for the war period and that the operation was merely incidental to their detention. She disclaimed any obligation, on the vessels being returned to their enemy owners at the end of the war, to pay compensation to the enemy owners for physical injuries or maritime collision liens incurred during the war operation of the detained vessels. The enforcement of such a maritime lien against any of the detained vessels therefore would merely result in a sale of the detained vessel by an admiralty court at the end of the war and would thus not interfere with the operation of the vessel by the British Government and would be a loss falling on the German owners, who in turn had a right to look to the German government for recoupment of the loss on the ground that it was a cost of the war or loss of the German government.

The detention of the vessels was effected by a so-called "order of detention" entered by the prize courts. This order was first entered in the case of *The Chile,* 1. Br. & Col. Prize Cases (1914-1915), page 1; 1914 P. 212; 84 L. J. P. 1. Such orders were thereafter known as "Chile orders". No appeal was taken from the decision in *The Chile.* The right of the British government to "detain" these vessels on these conditions was, however, contested before the Judicial Committee of the Privy Council in *The Gutenfels* (decided April 7, 1916), 2 Br. & Col. Prize Cases 36, and in *The Prinz Adalbert* (decided February 4, 1918), 3 British & Col. Prize Cases 70, 72. In *The Prinz Adalbert* it was held, speaking through Lord Parker, that the government should be entitled to "detain" the ships, but that "The proper order should, in

their opinion, be what is known as the Chile Order, 1914 P. 212, at p. 217. The effect of making this order will be to reserve all rights intact for decision when the war is over, and the views of the German government as to the true construction of the Convention can be ascertained. As the order their Lordships propose to make is that which the appellants ask for in these appeals, and as they have had to come here to get it, the Crown should in their Lordships' opinion, pay the costs".

At the end of the war, Germany having lost, England neither returned any of the detained vessels nor awarded compensation to the German owners for the violation of international law in "detaining" the vessels without allowing them days of grace to return to Germany. The German nationals who owned the vessels are apparently precluded by the sweeping grant made by their government in the Treaty of Versailles from enforcing the return of the detained ships or obtaining compensation from England for the violation of international law in detaining them.

Before the United States entered the war our citizens were unable to use the interned German ships because a transfer of flag to a neutral in time of war would have been a violation of international law. A plan was proposed to create a United States Shipping Board to charter or purchase the interned ships and operate them as owned, absolutely or *pro hac vice,* by the United States Government, thus preventing any other nation from condemning the ships as prize. This was opposed and defeated by Senator Henry Cabot Lodge and others on the ground that it would be a violation of international law and would almost certainly bring us into the war. Henry Cabot Lodge's Autobiography, published 1925, pages 26, *et seq.*

The Shipping Board however was created. Shortly afterwards, on other grounds, we entered the war.

Our status having been changed from a neutral to a belligerent, there was no longer any reason for making the ships vessels of the United States Government in order to avoid their condemnation by other nations because of being transferred to neutral nationals in violation of international law.

All the German merchant vessels in United States ports, including the *Antigone*, were detained or sequestered in April, 1917 (R. 55) shortly before or at the time we declared war.

After we declared war the question arose whether the United States would observe the rule of international law which was incorporated in the sixth section of the Second Hague Convention of 1907 prohibiting the detention, confiscation or requisition on payment of compensation of these ships and requiring that they be given days of grace within which to return to Germany.

Upon the outbreak of the war with Spain President McKinley in a proclamation of April 26, 1898, had declared that "Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places". Foreign Relations, U. S., 1898, p. 772; Moore, Digest International Law, vol. VII., p. 454.

President Wilson, however, did not make a similar proclamation. Counsel for the Government have not disclosed what the Government's records show was the reason given by President Wilson for not making such a proclamation. Although we had not signed the Hague Convention of 1907, the only reason we had not done so was because we believed that it did not go as far in exempting enemy private vessels and property from seizure as the settled rules of international law, which we regarded as binding, already required. John Bassett Moore, Digest, International Law, Vol. VII., p.

About a month after we declared war a proposed Joint Resolution, apparently inspired by the Shipping Board, was introduced in Congress. The proposed resolution authorized the President to requisition the German merchant vessels in United States ports, and provided that "The property rights and claims to compensation, if any, of such subject or citizen (owner of a seized vessel) shall be determined at the end of the war" (S. J. R. 42, introduced April 23, 1917, Government's Brief, p. 17).

Upon being referred to committee, the Resolution was redrafted authorizing a requisition on payment of just compensation to be determined by the Court of Claims in suits by the owners of the requisitioned vessels. The resolution as so reported by the Committee was amended by merely striking out sections 3, 4 and 5 which provided for just compensation to be recovered in the Court of Claims, and by inserting before the words "possession and title" in the first section the word "immediate".

The resolution was actually adopted in this roughly emasculated form. As adopted the resolution would appear at first blush to be an absolute confiscation of "the immediate possession and title" of the vessels. But an amendment was rejected which provided for the forfeiture or absolute condemnation of the vessels in the prize courts, and for their temporary use under immediate requisition pending such final condemnation. It is therefore clear that Congress, although not providing for just compensation, did not intend to confiscate the vessels. The fact that the words "possession and title" in the first section of the resolution are vestigial remnants of language used by draftors intending solely a requisition on payment of compensation, deprives those words of any meaning of confiscation.

It is clear from the resolution as finally adopted, read

in the light of the defeat of the various amendments and of the British experience with the interned ships which was fresh in the minds of Congress at the time, and of our own subsequent Trading with the Enemy Act relating to all the remaining enemy private property, that Congress did not intend either a confiscation or a requisition on payment of compensation, but that what Congress intended by the resolution was merely to authorize the detention and operation of the ships on the same basis as England detained and operated the vessels seized in English ports, and on the same basis that the British Public Trustee and our Alien Property Custodian detained or sequestered and operated as "going concerns" the various enemy owned factories and systems of transportation on land.

This would be treating alike enemy private property on land and sea and would put our Government during the war on the same basis as the British and other Allied governments with reference to the seized ships (our information being that the other Allied governments followed the British practice of detention by an analogous Chile Order), and at the end of the war would leave our Congress free to return the detained vessels without any obligation to compensate for physical injuries or collision liens incurred during war operation as a result of normal marine operating risks. Congress could in addition, if it so desired, make a gift or grant some measure of compensation to the German owners in order to make amends for our violations of international law in not giving the vessels days of grace within which to return to Germany after we declared war, and in not even having orders of detention, requisition or condemnation entered by prize courts, which alone are entitled to "detain" or "take over" to a belligerent enemy vessels which are seized in war time.

The war having ended in the defeat of Germany, the

United States, like England and the other Allies, has been saved the embarrassment of atoning for the violations of international law in not allowing the detained German merchant vessels an opportunity to return to Germany, and in not submitting to a prize court (in which the enemy owner and other claimants against the *res* could be represented by counsel) in the case of each vessel the question as to what the rights of the United States under international law were with reference to such vessel.

At the conferences at Versailles of President Wilson, Lloyd George, Clemenceau and Orlando, the question arose regarding the disposition of the German private merchant vessels which had been seized in Allied and United States ports at the outbreak of war. Lloyd George and the other Allied representatives and their expert assistants fought bitterly any claim of the United States to the ships seized in United States port on the ground that under international law the United States had not acquired any property right in them, that they had always been entitled to fly the German flag, and that they were voluntarily granted by Germany by the Treaty of Versailles not to the United States but to the Reparations Commission. The Allied representatives contended that the ships seized in all the countries should be pooled and distributed by the commission among the Allies and the United States proportionately to the number of merchant vessels lost by each nation as a result of the submarine warfare.

President Wilson agreed, subject to ratification by the Senate, to pay $100,000,000 to the Reparations Commission in consideration of the grant or recognition by the Allies of the property right of the United States in the seized German ships. This agreement was not submitted to the Senate and has not been ratified by it.

Unfortunately the United States committed one more violation of international law than any of the Allied governments. The United States Shipping Board in exercising the authority conferred by the Resolution of May 12, 1917, simply ignored the prize court jurisdiction of the district courts and of this Court. The definition and development of the law of prize was one of the greatest achievements of this Court during the time of Marshall, Story, Pinkney, and Webster. See *Charles Warren, Supreme Court in U. S. History,* vol. 2, page 27. Questions in that part of international law included in the law of prize or war can only be decided by a prize court. The exercise of prize court jurisdiction in war times has always been regarded by this Court as an important function of the judicial power. It is the "war power" of the judiciary analogous to the war powers of Congress and the Executive.

An alleged claim of the United States, based solely on the law of prize or war, which is informally presented after a long delay, like the present one, not in a court of prize but in a court of admiralty, should be scrutinized carefully.

The Court should at least hold that such a claim can be heard only on the prize side. Until a decree or order of detention or other document showing right of possession is obtained on the prize side, the claim should not be entertained on the admiralty side. The appellants moved to transfer the Government's claim to the prize side for final determination. The motion was based on the ground that the Government had not yet perfected or acquired a right to advance a claim to the vessel. It had not yet submitted the question of seizure to the district court on its prize side for determination whether it should enter an order of detention, condemnation, confiscation or requisition on payment of compensation.

If the Shipping Board, promptly after the seizure of the vessels, had brought these questions of international law to this Court on its prize side, the questions would have been finally decided, the proper procedure determined, and the embarrassing situation in which the United States has since found itself would not have arisen.

If this Court adopts the theory of confiscation argued by counsel for the Government in their brief in this case, it will undo utterly the statesmanlike results obtained by Secretary of State Elihu Root and Ambassador Joseph H. Choate in connection with the Second Hague Convention of 1907. It would also be at variance with the policy furthered by Secretaries of State John Hay and Charles Evans Hughes of the immunity of enemy private property from confiscation. It would also be in conflict with the usages of nations from which there has been no departure for more than a century (excepting the instances above mentioned in the European War).

The two principal authorities relied on by counsel for the Government in their brief are *Brown* v. *United States*, 8 Cranch 110 and *Miller* v. *United States*, 11 Wallace 268. Only certain *dicta* in *Brown* v. *United States* can be said to relate to this case. Those *dicta* were overruled by the same Chief Justice Marshall in *United States* v. *Perchemann*, 7 Peters 51, and again by this Court in *United States* v. *Klein*, 13 Wallace 128, *The Paquete Habana*, 175 U. S. 677, and other decisions in which it was held that usages of nations are law which will be enforced by this Court.

In Official History of the War, volume 2, Seaborne Trade, by C. Ernest Fayle (published 1923 by Longmans, Green & Co.; based on official documents; by direction

of the Historical Section of the Committee of Imperial Defence), at page 38, it is said:

> "To some extent the shortage in tonnage was made good during the early months of 1915 by bringing into active employment the prizes and detained vessels lying in British ports. The utilization of these vessels had been hampered by lengthy Prize Court proceedings, especially in the Oversea Courts; but by the end of January, 1915, all had been condemned or requisitioned, and those in oversea ports were being brought home by the Oversea Prize Disposal Committee, appointed in November, 1914, under the chairmanship of Vice-Admiral Sir Edmond Slade, in order that they might be utilized to the best advantage. Ships which, under the Sixth Hague Convention of 1907 were subject only to detention, could not be transferred to private owners, nor could they be generally employed in foreign trade, as there were difficulties with regard to their reception in neutral ports. The right of requisition, however, was unquestionable, and practically all the ships detained in home ports were ultimately employed, under the supervision of the Oversea Prize Disposal Committee, in coasting traffic, especially in the supply of coal to London. A few of the prizes condemned by the Courts were sold outright to British firms, by whom they were employed in their ordinary trade."

In Letters of Franklin K. Lane, at page 246, quoting a letter from Secretary Lane to Frank I. Cobb of the New York World written on April 12, 1917, before the adoption of the Congressional Resolution of May 12, 1917, it is said:

> "We of course are going to press into service at once the German and Austrian ships, such of them as can be repaired and will be of use in the freight business, but we will not confiscate them."

In Woodrow Wilson as I Know Him, by Joseph P. Tumulty, at page 529, the following cable dated May 25, 1919, from President Wilson at Paris to Mr. Tumulty at Washington, is quoted:

> "No one need have any concern about the return of the German ships in our possession. Full understanding has been reached about them."

In Woodrow Wilson and the World Settlement, by Ray Stannard Baker, volume 2, pages 392 and 393, discussing the conferences between President Wilson, Mr. Lloyd George, Mr. Clemenceau, and Mr. Orlando, after the Armistice and before the execution of the Treaty of Versailles, it is said:

> "But all discussions as to what ships the enemy powers should give up faded into insignificance alongside the controversy over who was to receive them. For it was plain that the nation which got the most ships quickly could soonest capture world trade. The greatest contest was over the ships which had been seized in American ports upon our declaration of War. These amounted to nearly ten per cent. of the existing ships; and the principle involved a great many more seized by Brazil and Portugal under similar circumstances.
>
> Two contrary doctrines at once developed. (The two cases are developed at length in the Supplementary Report of the Sub Commission on Capacity to Pay, of April 18. Also in appendix to Minutes, Council of Four, April 23.)
>
> The proposal of the European Allies was that Germany should simply cede to the Allied and Associated Powers title to all the ships in which she did not lose it by legal transfer or prize court decisions. The American proposal was that she should make cession to the individual powers in whose possession the ships were at the time, thus

leaving to the United States all the ships seized in our harbors. In short the Allies wished to pool these ships with all the others and redistribute them in proportion to losses during the War.

The essential objection to the American proposal was that powers which had been neutral in the beginning of the War and so had attracted German ships to their ports of refuge would receive more tonnage than they had lost; while the Allied Powers would receive much less than their losses. The discussion was hotly pursued by the experts, and even more violently in the Council of Four."

And at page 395, quoting the Secret Minutes of the Council of Four, June 10, 1919, Mr. Baker says:

"President Wilson pointed out that this shipping was the only *reparation* that the United States would receive after all their efforts in the War.

Mr. Lloyd George said that for the next few years tonnage was worth a great deal more than money. Those who were able first to establish themselves in overseas trade would gain enormous advantages * * *. It would be easier for him to justify to the British Parliament a claim by the United States for pensions than for these ships. He hoped that no arrangement would be concluded at the expense of France and Great Britain."

Counsel for the Government in their brief rest on the theory that the Government did not merely in April, 1917, detain or sequester the *Antigone* and later under authority of the Resolution of Congress of May 12, 1917, operate her as sequestered or seized enemy property, until she was ceded to the United States by the Peace Treaty.

Government's counsel contend that Congress and the

President intended to seize in 1917 not merely the right to operate the *Antigone* for the period of the war, but also all permanent property rights in the *Antigone*.

There was, of course, no public need for a seizure of more than the right to operate the *Antigone* during the war. It would seem so clear as to be obvious from the debates in Congress, the various bills and amendments introduced, and the contemporaneous statements of the officers of the Executive, that it was the intention of everyone not to seize the right to operate the *Antigone* after the war was over or to effect any permanent taking.

A seizure of the right to operate the *Antigone* after the war was over would not be a seizure for war purposes, but a seizure for possible use of the vessel after the war was over as part of a merchant marine. Congress had no such thought in mind.

Also a permanent taking without prize court condemnation would have been in clear violation of international law and the usages of nations. Congress, assuming it had the power, intended no such violation. Such intention should not be presumed in the absence of the clearest language. Such permanent taking could only be justified on the assumption that Congress intended to treat the unoffending, privately owned enemy ships as spoils of war. This would be contrary to the well-settled policy of the United States.

Counsel for the Government would make the words "immediate possession and title" in the Resolution read "permanent possession and title". An examination of the files of the other Departments of the Government would have made it clear to counsel for the Government that neither the President nor Congress in 1917 had any such intention. Congress was not waging war against unarmed privately owned enemy property which we had invited into our ports for commercial purposes in peace time. It was waging war against the German army and

navy and merely wished these privately owned enemy vessels to continue to operate between the United States and Europe so that our army and its supplies could get over there to fight the German army.

The Western Maid, 257 U. S. 419, is inapplicable. There was no seizure in that case. Ownership of the vessels by the United States was admitted.

The Siren, 7 Wall. 152, however, is directly in point. In that case as here the colliding vessel had been seized by the United States and while in custody or possession of the United States and before any condemnation by a prize court or acquirement of title by treaty was in collision and thereby became subject to a maritime lien. The United States there, as here, filed a claim to the vessel stating that she had been seized as prize or spoils in time of war. This court recognized the title of the United States, as we ask it to do here, subject to satisfying first the collision lien. It is not questioned by the United States that the *Antigone* at the time our libel was filed was within the territorial limits of the court and was at that time subject to the ordinary *in rem* process of the admiralty courts (the *in personam* remedy provided by the Suits in Admiralty Act being of course a mere substitute for an *in rem* remedy).

The Siren has never been overruled. In *The Western Maid* it was distinguished on the ground that in *The Siren* the United States voluntarily filed a claim in the court that the vessel had been seized by it in time of war and therefore belonged to it as a prize. This Court held that the filing of such a claim was itself a submission to the jurisdiction of the court. The United States has filed the same claim in the present case.

The China, 7 Wallace 153, case is, however, much stronger for the appellant than *The Siren.* In *The Siren*

commissioned officers of the United States Navy were in charge of the ship at the time of the collision. In the present case a civilian pilot was in charge and a non-commissioned employee was acting as master. Aside from *The Siren,* the present case is therefore sustainable solely on the authority of *The China,* 7 Wall. 53. In *The China* as here, a civilian pilot was in charge of the colliding vessel. This court held that the vessel was liable *in rem* irrespective of who owned her. No pilot being in charge of any of the vessels in *The Western Maid, The China* was not referred to by Mr. Justice Holmes in his opinion in that case. *The China* has not been overruled or modified, and has been followed innumerable times by the admiralty courts.

The seizure was in fact a "detention" or sequestration and operation like the British detention and operation of similarly seized ships and like our Alien Property Custodian seizure and operation of property on land. There was no intent to condemn the *Antigone* as property of United States.

Our case can be supported entirely independently of *The Siren* and *The China.* The *Antigone* in April, 1917, was detained or sequestered as enemy property in the same way that the Alien Property Custodian later, under the Act of October, 1917, sequestered the remaining enemy owned property.

The Resolution of Congress on May 12, 1917, merely confirmed this sequestration and authorized the operation or use of the sequestrated ships in the same way that the Alien Property Custodian was authoribed by the Act of October 6, 1917, to operate or use the property sequestered by him. The ships were designed for operation and in normal times

"ploughed the seas". The Resolution merely authorized the continuance of their normal operation as "going concerns". The *Antigone* in peace time normally sailed as a liner between Europe and the United States. After the adoption of the Resolution and at the time of the collision she continued so to sail.

Neither Congress nor the President intended to condemn these unoffending privately owned ships as spoils of war, as property belonging to the United States. The only need was that the ships be continued in operation as instruments of transportation during the war and that the United States have the right to designate what cargo or passengers should be carried on them. The intent was to seize only enough to satisfy this need. If the war had ended as a draw two days after the ships were put in operation in accordance with the Resolution, can there be the slightest doubt that the ships would have been returned to their private German owners?

Could the United States immediately after the seizure have made a gift of these seized ships to, say, a private citizen of a neutral country?

The only reason they were not actually returned was because we won the war and because President Wilson at the Peace Conference and Congress by the Treaty with Germany took the position for the first time that these ships were spoils of war and were the only reparations that the United States would receive. The Versailles and Berlin Treaties thus made these ships property of the United States. This we conceded in our pleadings and in our first brief.

But looking at the matter as of the time of the collision in this case, October 6, 1919, the German ships, particularly this ship, the *Antigone,* were still owned by the German owners and were merely being operated as sequestered property.

It would be an unprecedented and inequitable exten-

sion of the theory of immunity to hold that such sequestered property is so merged in the sovereignty of the United States as to be immune not merely from enforcement of liability but from the creation of liability for violation of the ordinary maritime collision rules.

The experience of centuries has shown that the universal observance of these rules is necessary to protect lives and property at sea. Exempting a fast steamer from the duty of observing these rules is like giving a man a gun and telling him to shoot anybody he happens to meet without fear of being held accountable. Moreover, to make innocent vessels bear the result of reckless navigation of these sequestered ships is to make innocent vessels bear the direct operating costs of waging the war.

At the time of the collision the *Antigone* still had her certificate of registry as a German merchant vessel. She was in structure an ordinary merchant ship. Her appearance had not changed since she was seized. She looked to approaching vessels like a private ship. Her crew were, according to the affidavit of Phipps, sworn in the Army Transport Service, but none of them was a commissioned officer of either the Army or Navy, nor an "officer of the United States" nor an enlisted man of the Army or Navy. She had no passengers or troops and no cargo on board, excepting a few boxes of household effects.

Yet counsel for the Government suggest that other passing vessels were not entitled to rely on the expectation that she would observe the ordinary collision rules under the penalty of being subjected to the usual maritime lien. According to counsel for the Government she could run amuck without either herself or any officer commissioned by the United States being held liable.

We contend that such a ship is not entitled to the extraordinary privilege of immunity from ordinary mari-

time liability or lien for a violation of the collision rules. Only the most exigent reasons should exempt property within the territorial limits of the sovereign from the ordinary jurisdiction of the sovereign's own judicial officers. If the facts disclosed show that naval or military maneuvers are not involved, but simply the ordinary application of the collision rules, why should not the sovereign's judicial officers maintain jurisdiction?

Judicial officers have jurisdiction over every act excepting political acts which by their nature are not justiciable.

If Congress had intended that this great fleet of sequestered ships should be immune from any obligation to obey the collision rules it would surely have said so. To grant such wholesale immunity would be imposing on innocent vessels damaged without right of recoupment, the direct, operating cost of the action that Congress was then authorizing, namely the use of the sequestered ships.

Immunity is accorded to battleships which are commissioned by the President and whose officers are also commissioned by him. Naval maneuvers and operations, cannot, of course, be governed by collision rules. But even in such case if damage is caused to innocent unarmed vessels a claim of ownership and of immunity is filed by a commissioned officer or other naval, military or political officer entitled to assert immunity for the ship and himself from the jurisdiction of the courts. *The Exchange,* 7 Cranch, 116.

This Court has been increasingly severe and rightly so, in requiring claims of immunity to be presented by a political or executive officer of the highest rank in the most formal way. *The Pesaro,* 255 U. S. 216; *In re Muir,* U. S. . A proper regard for the dignity of the judiciary requires that exemptions from judicial juris-

III.

Is a United States attorney entitled to advance a claim to a vessel in an admiralty court which is designed to oust the court of jurisdiction and which is based not on a document of title or on a decree of a prize court, but on a war time seizure cognizable only in a prize court administering international law? If so, is such claim an independent proceeding constituting submission to jurisdiction?

Is the extraordinary claim or suggestion filed by the United States attorney an independent proceeding in the sense that it requires the court to litigate not merely the subject matter of a collision cause in admiralty, but also the subject matter of the rights under municipal and international law acquired by a war time seizure of an enemy merchant vessel? If the claim raises this new subject matter, the Government under the decision of this court in *The Thekla*, 266 U. S. 328, has submitted to the jurisdiction of the court and our maritime lien should be recognized as a condition to any action by the court in determining on the evidence of the seizing official that property right in the *Antigone* should be confirmed in the United States.

The Government has never produced any commission, certificate of registry or enrollment, charter party or any other document of the *Antigone* showing right of possession or ownership in the United States. The so-called claim or suggestion of the Government is therefore unsupported by any evidence which is admissible in a collision cause in admiralty. Counsel for the Government have been unable to cite any admiralty collision case, and we have been unable after diligent search to find one, in

which mere evidence of a war seizure such as the Government relies on here has been admitted as evidence to show right of possession or ownership of the *res* under attachment. The present libel is for all purposes, a proceeding *in rem* against a *res* in possession of the admiralty court. The Government admits by the pleadings that at the time our libel was filed the *Antigone* was subject to the ordinary *in rem* process of the admiralty court at New York. The *in personam* remedy actually pursued under the Suits in Admiralty Act has been held by the court in *Blamberg Bros.* v. *United States,* 260 U. S. 452, to be a mere substitute for the *in rem* remedy.

The Government therefore is here trying in substance to take an ordinary merchant vessel from the possession of an admiralty court. The claim of privilege or right to do so consists of an unverified paper which is signed and filed only by the United States attorney at New York through two of his assistants, and which is unsupported by any ship's document or by the testimony of the master or any member of the crew, or by any evidence which has ever before been admitted in an admiralty collision cause.

Under these circumstances, as Circuit Judge Hough has held in this case the real question involved is whether the Government has a right to advance this peculiar claim in an admiralty collision cause.

The inadequacy of the Government's brief and proofs invites the Court either to dismiss the claim of immunity for insufficiency of evidence or explanation, or to hold that the Government's claim is itself a submission to jurisdiction, being a request for judicial determination of a property right.

As Judge Hough said (R. 23) the question involved is whether the Government has introduced sufficient evi-

dence to show that it is entitled to advance a claim of immunity to the steamship *Antigone*. He said:

> "The best analogy to such a thing as this 'suggestion' on the instant side is the trial of a claim. That is to say, it is old practice that a person proffering a claim to a vessel *in rem* may be called upon *in limine* to thresh out his right to claim. So here the United States must first thresh out its right to be dismissed without trial" (Judge Hough's Opinion, R. 23).

In *The Gul Djemal*, 44 Sup. Ct. 244, a claim of immunity on behalf of a vessel admittedly owned by the Turkish Government was filed by a duly commissioned officer of the Turkish Navy who was acting as master of the vessel. This Court held that:

> "The immunity could not have been successfully set up by a duly recognized consul, representative of his sovereign in commercial matters, in the ordinary course of his official duties, and there seems no adequate reason to presume that the master of the *Gul Djemal* had any greater authority in respect thereto. Although an officer of the Turkish Navy, he was performing no naval or military duty and was serving upon a vessel not functioning in naval or military capacity but engaged in commerce under charter to a private individual who undertook to carry passengers and goods for hire. He was not shown to have any authority to represent his sovereign other than can be inferred from his position as master and the circumstance specified in the stipulation of facts."

IV.

A grant of immunity in the present case would extend the limits of immunity beyond those defined in *The Western Maid*, 257 U. S. 419. Moreover, the decision in *The Western Maid* has been criticised as based on a philosophical theory which is inapplicable to maritime law.

In the Government's Petition for a Writ of Prohibition in *The Carolinian* (heard and decided with *The Western Maid*, 257 U. S. 419), it was said:

> "At the time of the collision (February 15, 1918), the United States *commissioned* her (*The Carolinian*) as an Army cargo transport and employed her to serve military needs in war service" (p. 6).
>
> "At the time of the collision the *Carolinian* was a *commissioned* Army transport" (p. 6).

The libel "presents a claim for tort arising out of a collision alleged to have resulted from the incompetence or want of skill of Army officers *commissioned* to man and operate an Army transport" (p. 8):

> "The *Carolinian* at the time of the collision was a vessel belonging to the United States" (p. 7).

The Government, in its suggestion in *The Carolinian*, 257 U. S. 419, said (Record, *Carolinian* case, p. 14):

> "At the time of the collision, February 15, 1918, the steamship *Carolinian* had been requisitioned by the Government of the United States upon the bare boat basis, copy of which bare boat charter is filed herewith."

The bare boat charter party under which the *Carolinian* was operating at the time of the collision provided (Record, *Carolinian* case, pp. 32 and 34):

> "War and Marine Risks.
>
> "Fourth: The United States shall assume war, marine, and all other risks of whatsoever nature or kind, including all risk of liability for damage occasioned to other vessels, persons or property" (Record, *Carolinian* case, p. 32).
>
> "Compensation in Event of Loss or Damage.
>
> "Ninth: In case of actual or constructive loss as provided in clause tenth, due to the operation of a risk assumed by the United States, just compensation for such loss, with interest at 6 per cent. per annum, commencing 30 days after the date of such loss, shall be paid by the United States" (Record, *Carolinian* case, p. 34).
>
> "In case of damages (not constituting an actual or constructive loss) due to the operation of a risk assumed by the United States, the vessel shall, at the cost to the United States, be restored to the owner at the expiration of her service under the requisition, in the same or as good order and condition as that in which she was when delivered to the United States, ordinary wear and tear excepted; or just compensation for the damages, with interest at 5 per cent. per annum, commencing 30 days after proof of such damage upon redelivery of the vessel, shall be paid by the United States."

In the present case the United States made no promise to return the seized enemy property free from physical injuries or collision liens.

Moreover, the contention of the Government in this case is based on a misconception of what a maritime lien is (see *The China*, 7 Wall. 53 and *The John G. Stevens*,

170 U. S. 113, 120), and shows a confusion of thought with reference to the relation of rights *in rem* and in *personam* to actions and procedure *in rem* and *in personam*. See Professor Walter Wheeler Cook's article in 15 Columbia Law Review 37-54.

The majority opinion of this Court in *The Western Maid* apparently assumed that the lien involved was a lien dependent on possession or right of immediate possession, like a common law lien. The Court decided that because the lien could not be enforced by dispossessing the sovereign in possession, there was no lien. But it has been settled by a long line of decisions both in England and this country that a maritime lien for collision damages is not dependent on possession. The leading case is *The Bold Buccleugh*, 22 English L. & Eq. 62. The English and American decisions are reviewed in *The Marjorie*, 151 Fed. 183 (C. C. A.).

In *United States* v. *Lee*, 106 U. S. 196, an action to recover possession of property, the Attorney General of the United States, without making the United States a party to the suit, filed a motion to dismiss on the ground that the property belonged to the Government and was in actual possession of its officers, and that, therefore, the Court was without jurisdiction to entertain the suit. This Court in a notable opinion rendered by Mr. Justice Miller considered with great fullness the doctrine of the immunity of the Government from suits without its consent, and hold that this immunity did not apply when suit was brought against Government officials in unlawful possession of property. The Court, thereupon, ousted the Government from possession.

In the dissenting opinion the same point was made that is made here by counsel for the Government, that

the suit was simply an action "to invade the possession of the sovereign and to disregard the fundamental maxim that the sovereign cannot be sued".

Referring to the decision in *United States* v. *Lee*, *Charles Warren in Supreme Court in U. S. History*, vol. 2, page 395, says:

> "Though the decision is now regarded as one of the glories of American law, there were varied views taken of it at the time of its rendition * * *.
>
> The highest tribunal of the Union by its decision, in short, has recognized the wisdom and solidity of a response made by Judge Shipman to one member of the Court, during the proceedings—a response which will, let us hope, become proverbial in American thought and speech. 'Do I understand your position to be', said one of the Supreme Court Judges to Judge Shipman, 'that if the title to a piece of land on which the Government has set up a lighthouse should be disputed, the claimant might bring an action of ejectment, and, if successful, remove the lighthouse?' 'Certainly', replied the intrepid lawyer. 'That is my position. Far better extinguish all the lighthouses in the land than put out the light of the Law.'"

Professor John Dewey in *23 Columbia Law Review* 406, reviewing H. Krabbe's Modern Idea of a State, said:

> "Both from the side of law and of politics there has been of late years a growing revulsion against the theory of the state as sovereign which ruled jurisprudence as well as political theory from the seventeenth century. * * * The state in giving and administering law is still bound by law; it is not sovereign in the old sense.
> * * * * * * * *
>
> He (Dr. Krabbe) then shows how the political theory of the sovereign as the source of law led to

a conceptual system of jurisprudence, what Professor Pound has called mechanical jurisprudence. * * * * * * * *

The book is a notable contribution to the movement to define the state as a legal organization of community interests instead of as an extra-legal political force, and to interpret concrete problems of law from this point of view."

Professor Munroe Smith of Columbia University, in "Jurisprudence", at pages 31 and 32, said:

"The conception of the legal right is today so familiar, and it seems so simple, that we can hardly realize with what difficulty it was attained. But as early law was wholly remedial and the substantive legal order which the remedies supported was only slowly recognized so the legal right long lay concealed behind the correlative and essentially ethical notion of the duty. * * * And only in our own time has it been clearly perceived that the legal right, previously regarded as the atom of all legal relations, is itself a combination of a definite interest and a limited power, and that these two elements are separable. This was one of Jhering's great contributions to jurisprudence. Coupling this analysis with Burgess's sharp distinction between state and government, we see that it is in no sense inexact, as has been frequently asserted, to speak of public legal rights. Of course, limited powers can not be attributed to the state, because the state is legally omnipotent; but limited powers may properly be attributed to any organ of government, and our public rights are in fact a combination of definite public interests with limited governmental powers. The possible developments of this line of thought in private and in public law are as yet imperfectly realized."

The dictum in *The Western Maid*, that the usages of nations constituting maritime law are a part of the

municipal law of the United States and, therefore, are enforceable only as expressions of the local sovereign's will is, of course, true, provided the usages are applied by the courts as they actually exist and are not cut down, as in *The Western Maid,* by immunities based on a monist theory of municipal law.

In *19 Columbia Law Review,* 429, at page 466, Definition and Nature of International Law, it is said:

> "It is said, however, that international law is a part of municipal law, and a considerable discussion in the books will be found on this subject as to which there is great obscurity of thought. It is perfectly obvious upon reflection that the two bodies of law are so entirely separate and distinct with respect to one of the prnicipal factors determining the conduct in question that in no sense can it be said that international law is a part of municipal law, or *vice versa.* What this confusing discussion amounts to is this: the international factors operating on a state determine the conduct of that state, and the state whose conduct is so determined must in turn see that its individual members and subordinate officials comply in their conduct with that international obligation resting upon it. The state, therefore, must make its municipal law conform to the international obligation unless it desires to act contrary thereto."

Professor Munroe Smith of Columbia University in *Jurisprudence* (Columbia University Press), said:

> "The reaction in favor of constituted authority produced both the positivist and the historical theories of law, or at least led to their more precise formulation. The positivist theory, as formulated by Hobbes, was a direct result of the English revolt against the crown. Hobbes did not deny the existence of natural law, but he asserted that

it was not 'law proper'. The law of nature, he neatly remarked, 'is become of all laws the most obscure, and has consequently the greatest need of able interpretation'. Only the sovereign or the judges to whom he delegates authority are competent interpreters. This of course is the theory which was implicit in the Roman jurisprudence, but Hobbes was the first to make it explicit.

The historical theory wos formulated in the reaction against the French revolution. The historical school found its antidote to the natural-law theory, not in the will of the sovereign, but in the authority of the past. According to this theory, presented in the field of public law by Burke, formulated as applicable to all law by Savigny, law is not made, it grows. The judge who declares it, the legislator who seems to make it, are simply interpreters of the national sense of right; and this in its turn is a product of the nation's entire historical existence.

To a certain extent the historical school also represents, at least in English-speaking countries, a reaction against the positivist school; less indeed against the theories set forth by Hobbes than against those formulated by the so-called 'analytical' jurists. Confusing, as did Hobbes himself, the state with the government and finding sovereignty not in the crown, as did Hobbes, but in Parliament, the analytical jurists have always been inclined to regard legislation as the normal source of 'law proper'. Maine and other English adherents of the historical school have not only rehabilitated judge-made law, but they have restored custom to its ancient (and perhaps unduly exalted) dignity and importance" (p. 36).

"The belief, so generally held to-day, that in a really advanced civilization legislation must cover the whole field of the law, that the finding of law by courts is a remnant of archaic conditions destined gradually to disappear—this belief has no basis except in the conditions existing to-day in continental Europe and in those countries which

have derived their institutions from continental Europe" (p. 26).

The usages of nations constituting the maritime law and international law are facts. They can be proved by evidence. It would seem to be unfair to suggest that such actual usages are imaginary by characterizing them as a "brooding omnipresence in the sky" (*The Western Maid*, 257 U. S. 419) simply because the legislative body of one nation has not enacted them as a statute. It would appear to be the important and peculiar province of the judiciary to act as the organ of the sovereign in taking judicial notice or receiving evidence of these international usages and then applying them. How do international usages become part of our law? Simply by their application by this Court in a given case on its being satisfied that the usages exist. *The Paquete Habana*, 175 U. S. 677. It is rather belittling the function of the judiciary under our Constitution to suggest that the only law—maritime of international—that this Court can apply is the statutory law enacted by Congress. The Constitution conferred on the judiciary the power and duty of applying the usages of the maritime law, and a great many years elapsed before Congress attempted to modify in any respect the content of those usages. It cannot rightfully be said that the usages of nations constituting maritime and international law are not law at all because there is no sanction or power of enforcement. It is the province and duty of our Federal courts to enforce such usages when they are shown to exist in a given case. From time immemorial the admiralty courts of the various civilized nations have been enforcing, without the guidance of legislative enactment, the maritime usages of nations. This Court has time and again enforced international law. There is therefore, behind these usages, the sanction and power of the local sovereign through his judicial arm.

Moreover the conception that law is based on the "power" of a State or sovereign is inconsistent with the fundamental theory of our form of government. It is true only of law imposed by a State or sovereign such as Germany was before the War. It is the conception of Treitschke in his "Politics" (translated by Dugdale and DeBille, vol. I, p. 22) that the State is, "above all, Power which makes its will to prevail". It cannot "tolerate any power above its own" (I, 26). Treitschke then concludes from the conception of the State as absolute will that the State is obliged to keep its treaties only so long as it wills to do so (vol. I, p. 28; vol. II, pp. 596-597).

If we fought "to make the world safe for democracy", it would be ironical if this Court should, after the victory, adopt the "Power" philosophy on which the defeated militaristic State was nourished.

In *The Scotia,* 14 Wallace 170, 187, Mr. Justice Strong, delivering the opinion of this Court, said:

> "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. * * * When therefore we find such rules of navigation as are mentioned in the British orders in council of January 9th, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty

> of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision * * * took place."

The question involved may be stated as follows: Did the United States, by entrusting the *Antigone* to the custody of her master and making him its agent, confer on him the "power" to subject the vessel to "liability" by altering her relations with other vessels. Professor Walter Wheeler Cook's article on Hohfeld's Contributions to the Science of Law, 28 Yale Law Journal 721, at page 727.

The United States entrusted the master of the *Antigone* with the power of navigating her on waters where other vessels, in order to insure the safety of the *Antigone* as well as their own safety, were observing the maritime collision rules. In other words, the United States conferred on the master of the *Antigone* the physical power of altering her physical relations with other vessels by colliding with them, resulting injuries to herself as well as the other vessels. His "power" to alter her legal relations is a mere corollary and incident of this grant by the United States.

This is of course but another way of saying that the United States by sending the *Antigone* to navigate among other vessels who are observing collision rules is voluntarily submitting her to the application of those rules and their enforcement by the courts.

In Law and Morals by Roscoe Pound, Dean of Harvard Law School, it is said:

> "In a crowded community where mechanical agencies of danger to the general security are in

> everyday use, and many sorts of business activity incidentally involve potential injury to society, thoughtlessness and want of care, or stupidity, or even neglect to supervise one's agent at his peril, may be as anti-social as a guilty mind, and so a group of legal offences may develop that take no account of intent" (p. 69).

Wrongdoing or a common law tort is not a necessary element, as this Court apparently assumed in *The Western Maid,* 257 U. S. 419. The liability is one without fault. It results from an operating risk inherent in the movement of a dangerous vehicle among other vehicles.

In Justice and The Modern Law by Everett V. Abbott, page 44, it is said:

> "There is another large class of rights which really rest upon consent, but which are treated in the common law under the head of torts. I refer this time to the numerous kinds of action which are based on an allegation of negligence.
>
> The obligation of a common carrier is to transport its passengers in safety. It is an obligation created by free volition, and when by reason of an accident a passenger is so transported as to suffer injury on the way, then the common carrier has committed a breach of its contract. Again, when the owner of an office building constructs an elevator and invites the public to use it in going to his tenants' offices, he also assumes a voluntary obligation to keep his elevator in proper order for the transport of passengers, and a breach of that obligation gives rise to an action of contract. * * *
>
> It is probably true, however, that all the actions which are treated in the books and by the courts under the head of negligence are either actions for assault and battery or actions for breach of contract, and that with an accurate and

> understanding conception of the law the word negligence would disappear from our juristic vocabulary. It is at best only a question-begging epithet, because it tacitly assumes the existence of an obligation which we are too intellectually lazy to determine. * * *
>
> If the nature of these actions had been clearly understood, for example, we should probably have escaped the notorious 'fellow servant' rule, the absurd theories as to 'assumption of risk', and the anomalous doctrine that the plaintiff must allege and prove the absence of what we call 'contributory negligence'."

It would seem to be obvious that mere use for public purposes of privately-owned property does not exempt the property from the ordinary jurisdiction of the courts. Still more obviously so, if the property, as in the present case, is not owned by the public, the United States, and a decree against it will be paid not by the United States but by the sale of property of an enemy private owner.

In the late War, as a result of the elimination of all excepting "key" industries, the greater part of the property in the United States was being used for a public purpose in furthering the war. A decision exempting property from judicial process solely because of furthering a public purpose would be virtually a declaration that courts in time of war are practically useless. War modifies the law applicable in certain situations, but the calming influence of the judicial power in applying the principles of public order is never so sorely needed as during a war upheaval.

War may, however, suspend the remedy accorded by a court of sequestering property to enforce a judgment which it has entered or intends to enter. But the suspension of this privilege of judicial attachment is not inconsistent with the existence and applicability of the substantive law. A court will hear the cause and apply

the rules of the substantive law, letting the successful party wait until the end of the war or public use before obtaining an enforcement of the judgment by judicial seizure and sale of the property.

The enforcement of a common law possessory lien may be an exception to this rule. A maritime lien, however, is not an exception because it is not dependent on possession—(notwithstanding the apparent contrary assumption by the writer of the majority opinion of this Court in *The Western Maid,* 257 U. S. 419). It is, as this Court has often held, a property right, a *jus in re,* a right *pro tanto* of title or ownership. In *The Western Maid* this Court held, apparently inadvertently, that ownership or title cannot exist without right of immediate possession.

In 23 Columbia Law Review 327, it is said:

> "Title in turn is the generalization by which we have sought to denote those rights *in rem* which may be acquired or enforced or transferred independently of possession, a concept which we have gradually built up through some centuries of legal experience."

In *Political Thought from Spencer to Today,* by Professor Ernest Barker of Oxford University, it is said:

> "He (Mill) had no clear philosophy of rights * * *. He had no clear idea of that social whole in whose realization the false antithesis of 'state' and 'individual' disappears" (p. 10).
>
> "Eichhorn set the fashion of the historical treatment of law; Savigny carried his teaching forward. 'Law', he told the world, 'is the organ of folk-right; it moves and grows like every other expression of the life of the people; it is formed by custom and popular feeling, through the opera-

tion of silent forces, and not by the arbitrary will of a legislator * * * Maine * * * wrote in a similar sense in Ancient Law'" (p. 164).

"Quoting Dicey he says that 'Maine * * * in his Ancient Law undermined the authority of analytical jurisprudence'" (p. 167).

"Law itself can exist, and does exist, before there is any legal act of legislation" (p. 177).

"There is much talk of federalism in these days. Behind the talk lies a feeling that the single unitary State, with its single sovereignty, is a dubious conception, which is hardly true to the facts of life" (p. 181).

"There is, as we have seen in an earlier chapter, a sense of right common to civilized nations. It is in the explication of that sense, and in its translation into a concrete legal embodiment, that the hope of internationalism lies * * *. Of such a development, resting on such a basis, Lord Haldane spoke in 1913 in an address to the American Bar Association. And it is on such a development, taking a legal form, and resting ultimately, as he urged, on the *Sittlichkeit*, or sense of a common ethic, of a group of allied nations, rather than on a development issuing from any economic factor, that we must fix our hopes" (pp. 246-247).

In *Present Conflict of Ideals*, by Professor Ralph Barton Perry of Harvard University, at page 520, it is said:

"Popular government means, then, that sovereignty is distributed among those whose interests are at stake. It means that those who hold political office are not, strictly speaking, rulers; but agencies by which the people at large govern themselves. In such a polity there are no longer any subjects, but only citizens, that is, individual units of political power."

The usages of nations come into existence as events and are then enforced by our sovereign through his judicial branch. They are not, like municipal law, created by the local sovereign—as the writer of the majority opinion in *The Western Maid* suggested. As said by Professor John Dewey, in *Human Nature and Conduct*, page 3:

> "Any theory which attributes the origin of rule to deliberate design is false. To take advantage of conditions after they have come into existence is one thing; to create them for the sake of an advantage to accrue is quite another thing."

The implication in the majority opinion in *The Western Maid* that law is not concerned with ethics would seem to require qualification in relation to maritime and international law.

As said by Professor John Dewey in *Human Nature and Conduct*:

> "For practical purposes morals mean customs, folkways, established collective habits" (p. 75).
>
> "Habit means special sensitiveness or accessibility to certain classes of stimuli, standing predilections and aversions, rather than bare recurrence of specific acts. It means will" (p. 42).
>
> "Curiously enough, the chief practical effect of refusing to recognize the connection of custom with moral standards is to deify some special custom and treat it as eternal, immutable, outside of criticism and revision" (p. 81).

The maritime and international customs, habits and will are enforced as such by the Courts. This shows that the Austinian concept of the omnipotence of a local sovereign on which the analytical school bases its theories is irreconcilable with the actual practice of the Courts in enforcing maritime and international usages.

The usages are not deformed by the Courts to fit within the principles or analytical theories of municipal law.

In *Justice and The Modern Law*, by Everett V. Abbott, at page 3, it is said:

> "It is perhaps worth while to pause long enough to analyze the error into which they have fallen who believe that law can be separated from ethics. Austin defines the law as the command of a political superior, that is, the sovereign, to a political inferior, that is, the subject; and his definition embodies that usual conception which forbids us to seek any reason for the law behind the law itself. This theory, however, resembles the somewhat similar theory of an original state of nature propounded by the French Encyclopaedists in that, however attractive it may be as theory, it is not justified as history, because, except in a comparatively small number of instances, the requirements of the law are ascertained and declared long before any command issues from the sovereign * * *.
>
> What is true in English jurisprudence is true in every other jurisprudence. Until the civilization of the community has advanced to a point at which a legislative power, be it king, or parliament, or the people at large, reduces the unwritten law to writing and promulgates it as a rule of conduct to be obeyed by the people generally, the adjudication of rights is fully accomplished without any command from the sovereign whatsoever. The power of the sovereign is, indeed, invoked to make the adjudication effective, and then commands are issued to the parties to the litigation; but the command which is embodied in an adjudication affects only the rights of the particular parties to the suit and their successors in interest, and is not the kind of command which declares the law for a community."

In *Law and Morals,* by Roscoe Pound, Dean of Harvard Law School, it is said:

> "When the analytical jurist analyzes the precepts and doctrines and institutions of developed law and, in the apt language of Mr. Justice Holmes, washes the results 'in cynical acid' (*Collected Papers,* 174), and thus finds fundamental legal conceptions of right and duty and power and liberty or privilege devoid of any moral content, he much deceives himself" (p. 34).
>
> "Except for routine cases, the analytical jurist grossly underestimated the role of morals in everyday decision. Morals do more than serve as a last resort when all else fails" (p. 39).
>
> "Analytical jurisprudence assumed that 'law' was an aggregate of rules of law" (p. 45).
>
> "Assuming an exact logically defined separation of powers, the analytical jurist contended that law and morals were distinct and unrelated and that he was concerned only with law" (p. 46).
>
> "Thus two false assumptions are at the basis of the analytical doctrine" (p. 48).

In *The Western Maid* this Court held that because the sovereign could not commit a "tort" (a word which, as Judge Hough has said, is "unknown to the historic admiralty") a maritime lien could not arise. The word *"tort"* is an invention of text writers.

In *Law and Morals,* by Roscoe Pound, Dean of Harvard Law School, it is said, at page 121:

> "In American procedure we shall find the courts setting up a system of actions *ex contractu* and actions *ex delicto,* actions known neither to the common law nor to the codes of procedure, on the basis of a 'natural' system of common-law actions worked out by text writers for convenience of exposition. (See *Bliss, Code Pleading,* sec. 9; *Supervisors* v. *Decker,* 30 Wis. 624; *Scott, Progress*

of the Law—Civil Procedure, 33 Harvard Law Review 236, 240-242.) We shall find philosophical pictures of an ideal social order, as in American applications of the doctrine that the common law is in force only so far as 'applicable' * * * We shall find scientific political ideas used in the same way in many legal precepts involving the idea of 'sovereignty'."

In *The State and The Nation,* by Edward Jenks, at pages 272 to 275, it is said:

"Finally, there is a profound and far-reaching distinction between Common Law and Prerogative States, though it is not very easy for any one but a lawyer to grasp. Perhaps it may be best explained by saying that, in the former class of States, the Government or other public official stands on precisely the same ground, as regards legal responsibility for his acts, as the private citizen; while, in the latter, the Government official is in a privileged position, is at least always presumed to be right, and his alleged offences are tried, not by the ordinary public tribunals, but by special Courts, composed, ultimately, of members of his own class, sometimes sitting in secret session. * * *

By a well-understood rule of English law, the 'King can do no wrong'—that is, no proceedings alleging a wrongful act can be directed against the King personally. But this rare immunity, granted for obvious reasons, does not extend to protect those who act by the King's orders; that point was finally settled on the impeachment of the Earl of Danby, more than two hundred years ago. And, though the King can pardon a convicted criminal, he cannot pardon an accused person before conviction; and he cannot intervene to stay a private lawsuit. This great Rule of Law extends even to the acts of the military authorities, both in war and peace; and the only occasions on which its application in this respect

has been seriously questioned in recent years, have arisen out of the employment of soldiers to quell disturbances of the peace. * * *

It must be remembered, that a British soldier is in the difficult position of being under two different and occasionally conflicting laws * * * the civil law which says that any one guilty of deliberately causing the death of a fellow-creature without lawful warrant is liable to be hanged, and the military law, which says that a soldier refusing to obey orders of his military superior is liable to be shot. Happily the British military code of obedience, strict as it properly is, is not absolute; and it may be safely said that there is no rule in it which condemns to death the man who refuses an *unlawful* military order.

All this may seem, to a Briton or an American, ordinary enough, nurtured as he has been in traditions of freedom. But it might be well that he should realize how rare it is, even among civilized nations. In many Oriental countries, the private civilian is helpless before authority, even in its most subordinate form; and it may be that government in such countries is not possible on 'common law' terms. But, even in European States, it is regarded as an impossible ideal; and Continental writers profess gravely to doubt whether government can really be carried on where it prevails. When confronted by the fact that 'common law' government in the British Empire and the United States has not been devoid of stability, these writers are apt to shrug their shoulders, and set down the fact as one of the many oddities of the Anglo-Saxon character. By any one who preserves an open mind, it can hardly be dismissed so lightly. Though, or perhaps we should say because, it is the outcome of a long historical struggle, in which the spirit of freedom has successfully fought against tyranny on the one hand and anarchy on the other, it is a contribution to practical politics of which the Anglo-Saxon has every right to be proud, perhaps more proud

than of any other of his political achievements. It implies no disrespect for authority, even authority as embodied in the State."

Professor Orrin K. McMurray in 23 Columbia Law Review 405, reviewing Oxford Studies in Social and Legal History, edited by Sir Paul Vinogradoff, said:

> "His (Dr. Ehrlich's) study of the liability of the crown during the period covered by him should at least serve to demolish the belief, finding support in utterances of some of our greatest lawyers, that the non-liability of the sovereign is a necessary corollary of the doctrine of sovereignty. As Dr. Ehrlich says, speaking of the thirteenth and fourteenth centuries (p. 54), 'Legal thought did not distinguish *in abstracto* between the king and other persons'. Mediaeval law started out with the idea that 'every wrong ought to be redressed' (p. 52), and found no difficulty, as the evidence conclusively proves, with such a doctrine as that the king may commit a tort and be a disseisor. The maxims 'that the king can do no wrong', '*nullum tempus occurrit regi*', and the like, did not, in Bracton's day, have the extent or definiteness of meaning that later was given them. The story of the development of the particular doctrine of the immunity of the sovereign from suit is wrapped up with the history of the prerogative. That American lawyers should have swallowed this creation of the prerogative lawyers, fish, bait and hook, is indeed surprising in view of the fate of the prerogative generally in our country."

CONCLUSION.

The decree below should be reversed with costs.

The claim or suggestion of the United States should be dismissed either for insufficiency of proof or because

not presented by a proper officer. If not dismissed the claim should be held to be an independent proceeding constituting a submission to the jurisdiction on either the admiralty or prize side of the court.

Dated, January 2, 1926.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 94

L. LITTLEJOHN & COMPANY, INC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 56–58) is not reported in the Federal Reporter, but is found in 1923 A. M. C. 219.

JURISDICTION

The judgment to be reviewed was entered February 28, 1923. (R. 58.) This appeal was taken May 26, 1923. (R. 61.) The suit was brought to recover losses resulting from a collision between the S. S. *Gaelic Prince* and the Army transport *Antigone*. The District Court sustained the suggestion filed by the United States that the steamship *Antigone*

at the time of her collision with the *Gaelic Prince* on October 9, 1919, was owned by and in the possession of the United States and was then employed in the public service and that by reason thereof she was immune from liability for collision losses. In reaching that conclusion the court held that the Joint Resolution of May 12, 1917, under which the United States acquired title to the vessel, is constitutional; that the Treaty of Versailles confirmed retroactively the acquisition of title by the United States, and that the District Court was without jurisdiction. The District Court certified that it so held. (R. 59–60.) The jurisdiction of this Court is based on Section 238 of the Judicial Code as it stood prior to the Act of February 13, 1925.

THE QUESTIONS

The questions presented are whether the *Antigone* was owned by or in the lawful possession of the United States at the time of the collision, and, if so, whether she was immune from liability for collision losses.

STATEMENT

By authority of the Suits in Admiralty Act of March 9, 1920 (C. 95, 41 Stat. 525), on February 19, 1921, the owners of the S. S. *Gaelic Prince* and of cargo laden aboard her filed libels to recover losses resulting from collision on October 9, 1919, between the *Gaelic Prince* and the Army transport *Antigone*. The libel by hull owners alleged (R. 8) that "at all times hereinafter mentioned the steamship (*Antigone*) was, and it still is, owned and operated by the

United States of America." The libels by cargo owners alleged (R. 12) that the United States of America "owned and operated the steamship *Antigone;*" (R. 3), "the United States of America did own, operate or control the steamship *Antigone.*" These references include the date of the collision as well as the time of filing the libels.

Following the practice it had adopted in *The Western Maid,* 257 U. S. 419, and many other cases, the Government filed its suggestion that the District Court was without jurisdiction for the reason that as the *Antigone,* at the time of the collision, was an Army transport employed by the Government in public service for national uses and purposes, no lien liability attached by reason of the collision and the libels could not be maintained.

Thereupon, plaintiffs amended their libels, which theretofore had pleaded ownership, possession and control of the *Antigone* by the Government at the time of the collision, so as to allege that at the time of the collision, October 9, 1919, the *Antigone* "was owned by a private person or merchant who was solely entitled to the immediate and lawful possession, operation, and control of said vessel" and that four days after the collision the United States came into possession of the vessel and so remained at the time the libels were filed, alleging (R. 19, 20):

> At no time prior to said 13th day of October, 1919, was the said Steamship *Antigone* owned, either absolutely or *pro hac vice* by the United States of America * * * nor lawfully in

the possession of the United States of America * * * nor lawfully operated by or for the United States of America * * *.

On the 13th day of October, 1919 (date of treaty of peace between Allies and Germany) the respondent United States of America became, ever since has been, and now is in the lawful possession of the Steamship *Antigone*, but at no time has the United States of America held the legal title to or been the absolute owner of said Steamship *Antigone*.

The *Antigone*, formerly the German liner *Neckar*, was acquired by the United States by authority of the Joint Resolution of May 12, 1917, entitled "Joint Resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes" (C. 13, 40 Stat. 75), and the Executive Order of June 30, 1917, by authority thereof.[1]

---

[1] EXECUTIVE ORDER—Whereas the following joint resolution adopted by Congress was approved by the President May 12, 1917:

"Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of

At the time of the collision the *Antigone*, thus acquired by the Government and in its possession, was operated as an Army transport solely in the transportation of supplies and troops of the United States Army between ports of the United States and England and France. Her status then was that of a public vessel of the United States employed for the national defense.

Exceptions and answer or traverse to the Government's suggestion of want of jurisdiction were filed

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the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole, or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

And whereas the following vessels were, at the time of coming into the jurisdiction of the United States owned in whole or in part by a corporation, citizen, or subject of the Empire of Germany, a nation with which the United States is now at war, or were flying the flag of or under the register of the Empire of Germany, or of a political subdivision or municipality thereof; * * * *Neckar* * * * .

It is therefore ordered that through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip and man the said vessels; to operate, lease, or charter the same in any service of the United States, or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth.

(R. 20–22), which denied that the Government by the seizure or appropriation of the *Antigone* under the Joint Resolution of Congress and the Executive Order by authority thereof had acquired either title or lawful possession of the *Antigone* prior to October 9, 1919. It suggested that such title or lawful possession could only be acquired through appropriate prize court proceedings. The District Court (Hough, C. J., sitting) then entered an order requiring the issues raised by the suggestion and traverse to be tried by the court. (R. 23–25.) It handed down a memorandum assigning its reasons for directing the issue. (R. 22, 23.) Proofs were then received. The court (Augustus N. Hand) sustained the Government's suggestion and dismissed the libels. (R. 56–58.)

The Joint Resolution of Congress of May 12, 1917 (R. 45), authorized the President to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof of German ownership or registry. By Executive Order of June 30, 1917 (*supra*), the President declared the *Neckar* (since renamed *Antigone*) to be German-owned, under German registry and flag. He directed the United States Shipping Board to take over to the United States the immediate possession and title of the *Neckar*. Section 2 of the Order directed the Secretary of the Navy to appoint a Board of Survey to ascertain the actual value of the vessel, its equipment and appurtenances, and to preserve such report with the records of the Navy Department.

Pursuant to this authority, the Shipping Board designated one Anthony V. Lynch to take possession of the *Antigone* (R. 43). This he did on July 17, 1917, by proceeding aboard the vessel and formally declaring possession to be taken in the name of the United States (R. 28).

> I affixed the original order by means of a thumb tack to some piece of boarding on board the ship and then recited a formula to the effect that I was taking possession of the ship in the name of the President of the United States and the United States Government. I then removed the original order and put the copy of it, an exact copy, in a frame and attached that frame to the ship.

The return by Lynch appears on pages 43, 44 of the record. Thus possession was secured, and title was acquired under the terms of the Joint Resolution of Congress and of the Executive Order.

The President on May 19, 1917, appointed a Naval board of inquiry (R. 47) which duly appraised the *Neckar* (R. 49). Thus all the conditions stated by the Joint Resolution of May 12, 1917, had been complied with.

By Executive Order certified August 29, 1917, the Shipping Board was directed to transfer the *Neckar* to the Navy Department. (R. 30.) By a formal Navy order dated September 1, 1917 (R. 49, 50), the *Neckar* was renamed the *Antigone*. On September 24, 1919, the *Antigone* was placed out of commission as a Naval vessel and transferred to the Army Trans-

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port Service. (R. 45.) The status of the *Antigone* as an Army transport thereafter and at the time of the collision which happened October 9, 1919, definitely is determined by the affidavit of the Superintendent of Water Transportation of the Army Transport Service (R. 46) which was received in evidence. Counsel conceded that the Superintendent (Major Phipps) would testify to the facts stated by the affidavit (R. 34). This affidavit reads (R. 46):

> That he is a Major in the Coast Artillery Corps, United States Army; that on the 9th day of October, 1919, and prior and subsequent thereto, he was a Colonel in the Coast Artillery Corps of the United States Army and was Superintendent of Water Transportation in the Army Transport Service for the Port of New York; that as such Superintendent of Water Transportation he had charge and control of all of the army transports leaving the Port of New York; that on September 24, 1919, at 3.30 P. M. the United States Navy Transport and Cruiser Force placed out of commission the Navy Transport *Antigone*, transferring the said vessel to the U. S. Army Transport Service; that on that date and at that time he took charge and control of the *Antigone* and placed a master, officers and crew on board the *Antigone*, who were at that time sworn in in the U. S. Army Transport Service; that thereafter on the 9th day of October, 1919, he gave orders to the captain of the Army Transport *Antigone* to sail from the Port of New York and proceed to Brest, France, in order to transport troops from

> Brest to the United States of America; that on October 9, 1919, the United States Army Transport *Antigone* sailed pursuant to such orders and while proceeding down the Ambrose Channel on her way to sea, came in collision with the *SS Gaelic Prince;* that at the time of the collision the U. S. A. T. *Antigone* was an Army Transport in the possession and control of the United States under his supervision and was carrying no cargo except 61 cases, crates (fols. 129 & 130), etc., of household effects consigned to Captain Ivan Jones, Asst. Military Attaché in Berne, Switzerland, and further deponent sayeth not.

From this review, the only conclusion to be reached is that at the time of the collision the *Antigone* was an Army transport in the possession of and operated under the direction of the United States Army Transport Service and assigned to transport troops from Brest to the United States. The collision happened while the *Antigone* in such service was proceeding from New York to Brest. Thus it is determined, as the suggestion of want of jurisdiction declares (R. 18, sec. 5), that at the time of the collision the U. S. A. T. *Antigone* was operated by the United States—

> solely in the transportation of supplies and troops of the United States Army to and from ports in the United States of America to ports in England and France; that the said U. S. A. T. *Antigone* was operated as aforesaid by the United States of America, was navigated and manned by officers and men employed by the United States, and that the said vessel was

allocated by the United States to the United States War Department.

The District Court (Hand, D. J.) found (R. 57, 58) that title to and possession of the *Antigone* at the time of the collision was in the United States, and that the vessel then was engaged in military service (R. 57, 58), and that as such public vessel she was immune from lien liability for collision losses. Accordingly the libels were dismissed.

ARGUMENT

SUMMARY

I. Under the Joint Resolution of May 12, 1917, and the Executive Orders issued thereunder, the United States acquired lawful possession of and title to the Antigone.

II. The Western Maid, 257 U. S. 419, settles the point that as the vessel was owned by or in the lawful possession of the United States and employed in the public service at the time of the collision she was immune from liability.

I

Under the Joint Resolution of May 12, 1917, and the Executive Orders issued thereunder, the United States acquired lawful possession of and title to the Antigone.

When the *Antigone*, formerly the *Neckar*, was seized in 1917 she was enemy owned and the United States had the right of a belligerent to seize, and, if it chose, to confiscate her.

> That war gives to the sovereign full right to take the persons and confiscate the prop-

> erty of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. [*Brown* v. *United States*, 8 Cranch, 110, 122, 123.]

It is settled that the Fifth Amendment to the Constitution of the United States providing that the United States shall not take private property for public use without compensation does not operate to restrict the war power nor protect the property of an enemy from seizure or from confiscation. In *Miller* v. *United States*, 11 Wall. 268, this Court said (pp. 304, 305):

> But if the assumption of the plaintiff in error is not well made, if the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, if, on the contrary, they are an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments. This we understand to have been conceded in the argument. The question, therefore, is, whether the action of Congress was a legitimate exercise of the war power. The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these

> powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right.

The provision of the Constitution (Article I, Section 8) giving Congress power to declare war and to make rules for captures on land and water places in Congress the power to decide whether enemy property shall be seized, and if seized, whether it shall be taken with or without compensation. *Ware* v. *Hylton*, 3 Dall. 199.

By the Joint Resolution of May 12, 1917, authority was granted to the President "to take over to the United States the immediate possession and title" of enemy-owned vessels and that authority was exercised. By this Joint Resolution and in the exercise of the war power Congress decided upon the taking over of title and possession of these vessels but postponed consideration of the question whether compensation should be paid to the German owners. We are not concerned here with the question whether Congress intended that compensation should be paid. It is sufficient for the purposes of this case that lawful possession or title was acquired by the United States.

Among the *German Ship Cases* now pending in this Court (Nos. 102, 103, 108, 109, 110–114, 116–117, 126)

is one (No. 114, *North German Lloyd* v. *United States*) in which the former owners of the *Antigone*, the vessel involved in this case, brought suit to recover her value on the ground that title had been acquired by the United States under circumstances which implied an agreement to pay compensation. The brief in the *German Ship Cases* deals more at length with the Resolution of May 12, 1917.

Under the Resolution of May 12, 1917, the institution of proceedings in a prize court was not necessary to the acquisition of title or lawful possession. The Resolution did not provide for any such judicial proceeding. It authorized the President "to take over the immediate possession and title," a method contemplating prompt action and the avoidance of the delay incident to judicial proceedings.

The legislative history of the Resolution set forth in the Appendix to this brief shows that Congress deliberately refused to adopt any provision for judicial proceedings.

Condemnation proceedings in a prize court are usual in maritime law and are useful in settling titles to vessels against all the world, but such a proceeding may be dispensed with by Congress.

In *The Western Maid*, 257 U. S. 419, 432, it was said:

> In deciding this question we must realize that however ancient may be the traditions of maritime law, * * * it derives its whole and only power in this country from its having

> been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.

Judge Hand in the opinion below said (R. 57):

> It is contended that neither title nor possession in this case could be lawful unless obtained in the course of prize proceedings. We have, however, an Act of Congress passed under the war power. All decisions made under other conditions must yield to this. The terms "immediate possession and title" evidently can not have contemplated proceedings in a prize court. International Law will be enforced in our courts but not in the face of a constitutional act of Congress. I can see no reason why the customary suit in admiralty may [not] be supplanted by direct governmental action if Congress clearly so prescribes.

It is so clear that the United States acquired lawful possession and title of this vessel under the Resolution of May 12, 1917, and the proceedings taken thereunder that consideration of the effect of the Treaty of Berlin is unnecessary.

II

The Western Maid, 257 U. S. 419, settles the point that as the vessel was owned by or in the lawful possession of the United States, and employed in the public service at the time of the collision she was immune from liability.

In *The Western Maid, The Liberty,* and *The Carolinian,* 257 U. S. 419, the Court held that if a vessel was owned by the United States *or* chartered to the United States, and was employed in the public service, no liability could attach to the vessel for a collision occurring while she was so employed which could be enforced even after she had passed into hands that could be sued.

In the present case the vessel was owned by the United States, in the lawful possession of the United States, and was employed in the public service when the collision occurred, ~~and also when the libels were filed.~~ The reasons for the rule stated in *The Western Maid* seem to make that rule applicable to this case, [where the United States, under claim of right, was in possession of and employing a vessel in the public service,] without regard to whether the possession was lawful, or whether the former owner could successfully contest the legal right of the United States to the possession of the ship. That the possession of the United States was lawful is so clearly established that further discussion of this point is unnecessary.

The decision in *The Western Maid* completely disposes of this case.

Respectfully submitted.

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NOVEMBER, 1925.

APPENDIX

1. Legislative History of the Joint Resolution—(Cong. Rec., Vol. 55, Part 2, p. 1572). S. J. R. 42 as originally introduced on April 23, 1917, reads (id. [pt. 1] p. 930).

"*Resolved, etc.*, That the President be, and is hereby, authorized to take over for the United States the possession and title of any vessel, within the jurisdiction of the United States, of any subject or citizen of any nation with which the United States may be at war, and, through the United States Shipping Board or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise, as he may see fit.

"The property rights and claims to compensation, if any, of such subject or citizen shall be determined at the end of the war."

As reported by the Committee on April 30, 1917, it reads (id. 1572):

The SECRETARY. The Committee recommends striking out all after the resolving clause and inserting the following words:

"That the President be, and he is hereby, authorized to take over to the United States the possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States, except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation

.th which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings hereinafter authorized on any claim for compensation.

"Sec. 3. That any person or corporation may institute a suit against the United States of America in the Court of Claims thereof for the recovery of the damages which he may sustain through the exercise of the power herein conferred upon the President. Such damages shall be limited to just compensation for the interest or right of which claimant is deprived by reason of such taking. In ascertaining such compensation there shall be excluded any value added to the vessel by reason of work done or improvements placed thereon by the United States. In order to recover a judgment the claimant must prove that he was the owner at the time of taking of the interest

or right for whose taking he seeks compensation; and that no nation with which the United States may be at war at the time of such taking, or at the time of rendition of judgment, nor any corporation, subject, or citizen of such nation, has any interest, direct or indirect, in such claim, or in the judgment which may be rendered thereon; and that claimant acquired in good faith and for substantial consideration the right or interest, for whose taking he seeks compensation, prior to the commencement of war with the nation whose citizen or subject owned, in whole or in part, the vessel taken, or under the register or flag of which such vessel was at the time of entry into the jurisdiction of the United States; if claimant be a corporation it must also prove that the majority of its stock is not owned by subjects or citizens of a nation with which the United States may be at war and was not so owned at the beginning of such war. If the required facts be established the court shall have power to render judgment for the amount due claimant subject to the right of appeal to the Supreme Court of the United States; but if such facts be not established the court shall render no judgment and shall make a report to Congress stating its findings of fact.

"Sec. 4. The Court of Claims is hereby authorized to make all needful rules and regulations not contravening the laws of the land or terms of this act for executing the provisions hereof.

"Sec. 5. All claims upon which suit may not be instituted prior to the expiration of one year from the date of exchange of ratifications of a treaty of peace with the Imperial German Government shall be forever barred."

This resolution was debated in the Senate (id. 1572-1576), and Sections 3, 4 and 5 were stricken out. (The words "hereinafter authorized" appearing in the last sentence of Section 2 were also stricken out.)

An amendment was offered, reading as follows (id. 1575):

"SEC. 3. That any vessel so seized shall be condemned in any district court of the United States for the district in which the same may be or in any court created by or under the authority of the United States having admiralty jurisdiction over the place at which such vessel may be seized, or into which it may be taken, pending which proceedings for condemnation it may be requisitioned by the United States under order of the court for such use or disposition as is provided for in section 1 of this act.

"No bounty, prize money, bonus, or other gratuity or reward shall be due or be paid to any person on account of the taking or seizure of any of the ships mentioned in section 1 of this act."

This was defeated by a vote of three Yeas and sixty-six Nays.

Further amendment was offered and defeated, reading as follows (id. 1576):

"Whereas the activities of the Imperial German Government in its efforts to destroy the commercial vessels of the United States, its allies, and the vessels of neutral powers creates an immediate emergency and an extreme necessity to at once replenish in a practical way the loss of ships thus sustained: Therefore be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President of the United States be, and he

is hereby, requested to at once requisition all vessels of alien enemies of the United States in the ports and waters of the United States, or elsewhere found, and to use the same in the prosecution of the war against the Imperial German Government in such trade or manner as will, in his judgment, best subserve the interests of the United States and its allies."

The resolution was passed by the Senate on April 30, 1917. It was considered by the House on May 7, 1917 (id. 1900–1936) and passed without amendment (id. 1936). The debates definitely determine that the Government by Executive action was to take over the immediate title and possession, whether acquired by confiscation or appropriated in the nature of requisition, with the question of compensation later to be determined by the Treaty of Peace or later legislative action. The title and possession acquired by the Government is firm. Further extracts from the Congressional Record relating to the Resolution of May 12, 1917, will be found in the appendix to the brief in the German Ship Cases, No. 102.

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SUPREME COURT OF THE UNITED STATES.

No. 94.—October Term, 1925.

L. Littlejohn & Co., Inc.; General Silk Importing Company, Henry W. Peabody & Co., et al., Appellants, *vs.* The United States of America.	Appeal from the District Court of the United States for the Southern District of New York.

[March 1, 1926.]

Mr. Justice McReynolds delivered the opinion of the Court.

The court below sustained a challenge to its jurisdiction, and this direct appeal followed.

October 9, 1919, in New York Harbor the steamships "Antigone" and "Gaelic Prince" collided. Serious injury resulted to the latter and its cargo. February 19, 1921, relying upon the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525), the owners seek to recover damages. The Act of March 3, 1925, c. 428, 43 Stat. 1112, is not applicable. They allege that the collision resulted from the fault of the "Antigone." Also that—

> At all the times mentioned herein prior to the 13th day of October, 1919, and particularly on the 9th day of October, 1919, the date of the collision hereinafter mentioned, the steamship "Antigone" was owned by a private person or merchant who was solely entitled to the immediate and lawful possession, operation, and control of said vessel. At no time prior to said 13th day of October, 1919, was the said steamship "Antigone" owned, either absolutely or *pro hac vice*, by the United States of America, nor by any corporation in which the United States of America or its representatives owned the entire outstanding capital stock, nor lawfully in the possession of the United States of America or of such corporation, nor lawfully operated by or for the United States of America or such corporation. On the 13th day of October, 1919, the respondent United States of America became, ever since has

been, and now is in the lawful possession of the steamship "Antigone," but at no time has the United States of America held the legal title to or been the absolute owner of said steamship "Antigone."

The United States appeared specially and suggested that when the collision occurred they owned, possessed and controlled the "Antigone" and therefore the court was without jurisdiction. This was denied and evidence was taken upon the consequent issue. Having considered the evidence, the court held that the United States owned the vessel and were navigating her, with a crew employed by the War Department, in transporting supplies and troops. The libels were accordingly dismissed for want of jurisdiction.

If the established facts show such ownership, possession and control, then, under the doctrine of *The Western Maid,* 257 U. S. 419, to which we adhere, the decree is clearly right.

The history of the matter is this. The "Antigone"—then the privately-owned German merchantman "Neckar"—took refuge within the United States prior to April 6, 1917, when war with Germany was declared. By Joint Resolution of May 12, 1917, c. 13, 40 Stat. 75 (copied in the margin*), Congress authorized the President to take over to the United States the immediate posses-

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation.

sion and title of any vessel within their jurisdiction which at the time of coming therein was owned by any corporation, citizen or subject of an enemy nation, or was under register of any such nation. By Executive Order of June 30, 1917, the President affirmed that the "Neckar" was such a vessel and ordered that "the possession and title" be taken over through the United States Shipping Board. He further authorized that Board to repair, equip, man and operate her. It accordingly took her, July 17, 1917, and thereafter a naval board appraised her. Subsequently she was transferred to the Navy Department, re-named the "Antigone," and later transferred to the Army Transport Service. October 9, 1919, she sailed under a master, officers and crew of the United States Transport Service from New York bound for Brest, from which port she was to return with troops.

Appellants say that the rules of international law as recognized by the United States forbade them from confiscating German vessels within their jurisdiction at outbreak of the war, and that the Resolution of May 12, 1917, should be so interpreted as to harmonize with these rules. They further insist that thus interpreted the Resolution only gave authority to detain and operate the "Antigone" as enemy property, leaving title in the original German owners and the vessel subject to ordinary maritime liens. Our attention is called to the course pursued by the British government and to certain decisions of their courts. *The Chile*, 1 Br. & Col. Prize Cases 1; *The Gutenfels*, 2 *id.* 36; *The Prinz Adalbert*, 3 *id.* 70, 72; *The Blonde*, L. R. (1922) 1 A. C. 313, 334.

Both Great Britain and Germany were parties to Convention VI of the Second Hague Peace Conference, 1907,* and the action of

*Article 1. When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

Article 2. A merchant ship unable, owing to circumstances of force *majeure*, to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, can not be confiscated.

The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.

the former, referred to by counsel, was taken in view of obligations thus assumed. The United States did not approve that convention, and the cited cases involved problems wholly different from the one here presented.

It is unnecessary to consider how far the ancient rules of international law concerning confiscation of enemy property have been modified by recent practices. In the absence of convention every government may pursue what policy it thinks best concerning seizure and confiscation of enemy ships in its harbors when war occurs. The Hague Conference (1907) recognized this and sought by agreement to modify the rule. *The Blonde, supra,* p. 326. Our problem is to determine the result of action taken under a Joint Resolution of Congress whose language is very plain and refers only to enemy vessels. It authorized the President to take "possession and title," and, obeying, he took them. We do not doubt the right of any independent nation so to do without violating any uniform or commonly accepted rule of international law; and Congress had power to authorize the action irrespective of any general views theretofore advanced in behalf of this government. Certainly all courts within the United States must recognize the legality of the seizure; the duly expressed will of Congress when proceeding within its powers is the supreme law of the land.

Brown v. *United States,* 8 Cranch 110, 122—"That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall chuse to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the Court." See *Miller* v. *United States,* 11 Wall. 268; *The Blonde, supra.*

The decree of the court below is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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